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A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective

Alexi Nicole Wood*

I. INTRODUCTION

“If every man in this courtroom had had his penis removed, what then? Would they understand better that that condition is similar to that of all the women in this room?”¹

At the age of ten, Hannah Koroma was genitally mutilated with a blunt penknife in Sierra Leone. Her grandmother told her that she would be

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1. ALICE WALKER, *POSSESSING THE SECRET OF JOY* 166 (1992) (telling the fictitious story of Tashi, who, in order to follow her tribal customs, voluntarily submits to female genital mutilation). Walker has worked to educate people about the dangers of female genital mutilation, and a portion of the royalties of *POSSESSING THE SECRET OF JOY* are “used to educate women and girls, men and boys, about the hazardous effects of genital mutilation, not simply on the health and happiness of individuals, but on the whole society in which it is practiced, and the world.” *Id.* at 285. In addition, she made a documentary film about female genital mutilation. ALICE WALKER & PRATIBHA PARMAR, *WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN* (1993) (film on file with the University of Cincinnati Langsam Library). For a more complete discussion of Alice Walker, see Hope Lewis, *Between Irua and “Female Genital Mutilation”*: *Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 34 (1995) [hereinafter *Between Irua*]; Jennifer A. des Groseilliers, *In re Kasinga: When the Axe Came into the Forest, the Trees Said the Handle is One of Us*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 89, 89 n.1 (1998). The title of des Groseilliers paper is a quote from Walker's *POSSESSING THE SECRET OF JOY*. *Id.* This quote from a bumper sticker indicates the pervasiveness of FGM. “The trees were not afraid of the axe, because they saw the handle as wood, meaning it used to be a tree. The trees did not believe that one of their own would hurt them.” When female genital mutilation is performed, the mother of the girl about to undergo the procedure is almost always involved. She may even hold her down. See *infra* section II.B.

taking part in a ceremony and afterward she would be given a lot of food. Ms. Koroma recalled feeling like a lamb being led to the slaughter. She was taken to a dark room and stripped naked. Four strong women held her down, and another sat on her chest. To prevent her from screaming, a piece of cloth was forced into her mouth. There were women all around dancing and singing, naked and drunk. Then the procedure began. First, Ms. Koroma was shaved. Then, without anesthetic, the external tissue of her genitalia was cut off. Ms. Koroma remembers the pain being unbearable. She put up a fight and was cut even more. She lost a tremendous amount of blood and became anemic. This was attributed to witchcraft. After the procedure, no one would help Ms. Koroma to walk, and she was not given antibiotics to ward off infection. The women put something on her wound, which stank and hurt. Ms. Koroma tried not to urinate because when she did, the urine would make the wound hurt all over again. Ms. Koroma continued to suffer from severe vaginal infections for many years.²

To date, it is estimated that female genital mutilation (FGM)³ has been performed on 135 million women and girls, like Ms. Koroma, worldwide.⁴ It is estimated that two million girls and women undergo FGM each year—approximately 6,000 a day.⁵ The actual number of mutilations that occur is

2. See Amnesty International, *Section One: What is Female Genital Mutilation?* (visited Feb. 17, 1999) <<http://www.amnesty.org/ailib/intcam/femgen/fgm1.html>> [hereinafter AI, § 1].

3. This paper will use the term “female genital mutilation” or “FGM” to describe the procedures that are performed. For a detailed discussion of the different types of FGM, see *infra* section II.A. The procedures are sometimes referred to as female circumcision, a totally incorrect phrase that belies the severity of the procedure. See Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155, 170 n.89 (1985). But see *infra* note 41 (explaining that some commentators and attorneys feel that male circumcision is in fact a form of mutilation as well). Hope Lewis chose to use the term “female genital surgery” “because it permits comparison, where appropriate, between traditional types of FGS and ‘modern’ forms of surgical modification of women’s bodies that are not generally subject to human rights scrutiny.” Lewis, *Between Irua*, *supra* note 1, at 7 (discussing the various terms used to describe the procedure). This author, however, is of the opinion that female genital surgery also belies the true nature of the procedure and implies it takes place in a clinical, sterile environment.

4. See AI, § 1, *supra* note 2, at 2. This figure is slightly higher than other estimates, even when one factors in the new cases that are performed every day. See Joanne A. Liu, *When Law and Culture Clash: Female Genital Mutilation, a Traditional Practice Gaining Recognition as a Global Concern*, 11 N.Y. INT'L L. REV. 71, 72-73 (1998) (estimating in early 1998 that 114 million women had been subjected to FGM); Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 420 (1996) (citing the same number from the World Health Organization). A recent New York Times article on the subject estimated that 130 million women had been subjected to FGM. See Barbara Crossette, *Senegal Bans Cutting of Genitals of Girls*, N.Y. TIMES, Jan. 18, 1999, at A10 [hereinafter *Senegal*].

5. See AI, § 1, *supra* note 2, at 2; Bashir, *supra* note 4, at 419; Liu, *supra* note 4, at 73; Crossette, *Senegal*, *supra* note 4. One author claims that as many as four to five million cases of FGM are performed each year. See Melissa A. Morgan, *Female Genital*

hard to pinpoint. Often the procedure is performed clandestinely by unlicensed practitioners,⁶ the wounds themselves are hidden and secret,⁷ and as many as fifteen to thirty percent of all girls and women who undergo FGM die as a result of bleeding or infection.⁸

Recently, much attention has been paid to FGM in legal commentaries,⁹ books,¹⁰ newspapers,¹¹ various non-governmental organizations (NGOs)¹² and the United Nations and its various branches.¹³

Mutilation: An Issue on the Doorstep of the American Medical Community, 18 J. LEGAL MED. 93, 94 (1997).

6. See MINORITY RIGHTS GROUP, *FEMALE CIRCUMCISION, EXCISION AND INFIBULATION: THE FACTS AND PROPOSALS FOR CHANGE 5* (Scilla McLean ed., 1980).

7. See Celia W. Dugger, *Tug of Taboos: African Genital Rite vs. U.S. Law*, N.Y. TIMES, Dec. 28, 1996, at A1 [hereinafter *Taboos*]; see also MINORITY RIGHTS GROUP, *supra* note 6, at 8 ("Since mutilations are less visible than, for instance, would be the amputation of the children's noses, health education campaigns have not been directed toward them.").

8. See Bashir, *supra* note 4, at 422 (citing Hanny Lightfoot-Klein, *Pharaonic Circumcision of Females in the Sudan*, 2 MED. & LAW 353, 356 (1983) (estimating that one-third of all Sudanese women who undergo FGM, in areas where antibiotics are not available, die)); Judy Mann, *Torturing Girls Is Not a Cultural Right*, WASH. POST, Feb. 23, 1994, at E13 (quoting Rosemary Mburu, a Kenyan gynecologist, who estimates that fifteen percent of all women who undergo FGM die of bleeding and infections).

9. See generally Hope Lewis & Isabelle R. Gunning, *Essay: Cleaning Our Own House: "Exotic" and Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123 (1998); Symposium: *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467 (1998); Carol M. Messito, *Regulating Rites: Legal Responses to Female Genital Mutilation in the West*, 16 IN PUB. INT. 33 (1997-1998); Sylvia Wynter, "Genital Mutilation" or "Symbolic Birth?": *Female Circumcision, Lost Origins, and the Aculturalism of Feminist/Western Thought*, 47 CASE W. RES. L. REV. 501 (1997); L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997); Stephanie Welsh & Robin M. Maher, *Female Genital Mutilation: The Struggle to Eradicate This Rite of Passage*, 23 HUM. RTS. 12 (Fall 1996); Catherine L. Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 J. CONTEMP. HEALTH L. & POL'Y 325 (1996).

10. See generally LAW AND BODY POLITICS: REGULATING THE FEMALE BODY (Jo Bridgeman & Susan Millns eds., 1995); MARILYN FRENCH, *THE WAR AGAINST WOMEN* (1992); SAMI A. ALBEEB ABU-SAHLEH, *TO MUTILATE IN THE NAME OF JEHOVAH OR ALLAH: LEGITIMIZATION OF MALE AND FEMALE CIRCUMCISION* (1994); RAQIYA HAJI DUALEH ABDALLA, *SISTERS IN AFFLICTION: CIRCUMCISION AND INFIBULATION OF WOMEN IN AFRICA* (1982); JULIETTE MINCES, *THE HOUSE OF OBEDIENCE: WOMEN IN ARAB SOCIETY* (Michael Pallis trans., 1982).

11. See generally Barbara Crossette, *When One Culture's Custom Is Another's Taboo*, N.Y. TIMES, Mar. 6, 1999, at C2; Barbara Crossette, *Mutilation Seen as Risk for the Girls of Immigrants*, N.Y. TIMES, Mar. 23, 1998, at A3; Howard W. French, *The Ritual: Disfiguring, Hurtful, Wildly Festive*, N.Y. TIMES, Jan. 13, 1997, at A4; Mary Ann French, *The Open Wound*, WASH. POST, Nov. 22, 1992, at F1.

12. In 1995, Amnesty International included FGM in its work on human rights. Amnesty International works with key leaders in local communities to help educate people about the dangers of FGM with a hope of eradicating the procedure. See Amnesty International, *Section Three: The Campaign to Eradicate Female Genital Mutilation*, at 1 (visited Feb. 17, 1999) <<http://www.amnesty.org/ailib/intcam/femgen/fgm.3/html>>.

13. In 1980, the Programme of Action of the United Nations World Conference on Women called for steps to be taken to fight against traditional practices that were harmful to

Awareness of FGM in the United States was sparked by the story of a young Togolese woman, Fauziya Kassindja.¹⁴ In June 1996, the Board of Immigration Appeals (BIA) granted Ms. Kassindja's request for asylum based on the fact that if she were returned to her native Togo, she would be forced to undergo FGM.¹⁵ Ms. Kassindja's story ended up on the front page of various national newspapers,¹⁶ and she was interviewed by major TV and radio stations.¹⁷

women. See Amnesty International, *Section Seven: United Nations Initiatives*, at 1 (visited Feb. 17, 1999) <<http://www.amnesty.org/ailib/intcam/femgen/fgm.7/html>>. According to Amnesty International: "In April 1997, three U.N. agencies—the World Health Organization, United Nations Children's Fund and United Nations Population Fund—unveiled a Joint Plan to bring about a major decline in FGM within ten years and to completely eradicate the practice within three generations." *Id.*

14. See Karen Musalo, *Ruminations on In re Kasinga: The Decision's Legacy*, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 357-60 (1998). Ms. Musalo was the lead attorney for Ms. Kassindja. See *id.* at 357 n.1. "Kassindja" is the correct spelling of Fauziya's last name. See *id.* at 357 n.1. When Ms. Kassindja arrived in the United States, the immigration official incorrectly spelled her name "Kasinga." See *id.* The misspelled version of her name was used on all INS and court documents. *Id.* According to Ms. Musalo, it was not until New York Times reporter Celia Dugger did an extensive story on Ms. Kassindja, and interviewed her family in Togo, that the correct spelling was reported. See *id.* (citing Celia W. Dugger, *Roots of Exile: A Refugee's Body is Intact but Her Family is Torn*, N.Y. TIMES, Sept. 11, 1996, at A1).

15. See *In re Kasinga*, 16 Immigr. Rep. B1-84, B1-91 (B.I.A. 1996). For a more complete discussion of the case, see generally Musalo, *supra* note 14; des Groseilliers, *supra* note 1; Connie M. Ericson, *In re Kasinga: An Expansion of the Grounds for Asylum for Women*, 20 HOUS. J. INT'L L. 671 (1998); Tiajuana Jones-Bibbs, *United States Follows Canadian Lead and Takes an Unequivocal Position Against Female Genital Mutilation*: In re Fauziya Kasinga, 4 TULSA J. COMP. & INT'L L. 275 (1997).

For a discussion of United States immigration law and FGM, see generally Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733 (1998); Timothy P. McIlmail, *Toward a More Reasonably Rebutted Presumption: A Proposal to Amend the "Past Persecution" Asylum Regulation—8 C.F.R. § 208.13(B)(1)*, 12 GEO. IMMIGR. L.J. 265 (1998); Gregory A. Kelson, *Female Circumcision in the Modern Age: Should Female Circumcision Now be Considered Grounds for Asylum in the United States?*, 4 BUFF. HUM. RTS. L. REV. 185 (1998); Beth Ann Gillia, *Female Genital Mutilation: A Form of Persecution*, 27 N.M. L. REV. 579 (1997); Amy Stern, *Female Genital Mutilation: United States Asylum Laws Are in Need of Reform*, 6 AM. U. J. GENDER & L. 89 (1997); Shannon Nichols, *American Mutilation: The Effects of Gender-Biased Asylum Laws on the World's Women*, 6 KAN. J.L. & PUB. POL'Y 42 (1997); Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN'S L.J. 263 (1997).

16. See Celia W. Dugger, *Woman's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, Apr. 15, 1996, at A1; Celia W. Dugger, *U.S. Frees African Fleeing Ritual Mutilation*, N.Y. TIMES, Apr. 25, 1996, at A1; Cindy Shiner, *Persecution by Circumcision: Woman Who Fled Togo Convinced U.S. Court but Not Town Elders*, WASH. POST, July 3, 1996, at A1.

17. See Musalo, *supra* note 14, at 357 (stating that Ms. Kassindja was interviewed by Ted Koppel for Nightline, Barbara Bradley for National Public Radio's *All Things Considered* and Judy Woodruff for CNN International). According to Ms. Musalo, Ms. Kassindja also entered into a contract for the rights to her story, which have since been published in a book entitled *Do They Hear You When You Cry?* (1998). *Id.* at 358 n.8. However, Ms. Musalo was not pleased with the final result of the book because she feels that other members of the

For most people, however, FGM remains largely a taboo subject.¹⁸ When Senator Harry Reid, a Democrat from Nevada, heard a CNN broadcast about a ten-year-old Egyptian girl who was mutilated, he was so moved by the story that he decided he wanted to do something about the practice, but his staff told him to stay away from such a sensitive issue.¹⁹ Senator Reid was not deterred and successfully pushed for legislation to outlaw FGM in the United States.²⁰ Yet, even this Senator who opposed FGM, and campaigned against it, was uneasy discussing the issue on the Senate floor.²¹ As he told New York Times reporter Celia Dugger, his discomfort arose from the fact that he was discussing a "little girl's vagina."²² However, the situation is changing. More countries have passed legislation to outlaw FGM,²³ and more groups are being formed to help educate and raise awareness of the harmful physical and psychological effects of mutilation.²⁴

This Article adds to the growing literature on FGM by analyzing FGM as a violation of international law, especially the United Nations ban on torture. Section II explores the various types of FGM that are performed, their historical background, the reality of FGM and the various attempts that have been made to help reduce the numbers of procedures performed. Section III examines how international law, covenants and treaties can be used to help protect women from FGM, and also from experiencing the continued agony and repression that accompanies FGM. Finally, this Article concludes by providing proposals for change.

II. FEMALE GENITAL MUTILATION: A CULTURAL RITE OF PASSAGE OR A FORM OF TORTURE?

There has been considerable controversy surrounding Western feminists' criticism of FGM.²⁵ The arguments tend to focus around the opinion that Western feminists and human rights activists who condemn FGM are trying to impose their own set of values on others, and are using international law documents to do so.²⁶ It is important to celebrate different cultures and not to impose Western values; however, this does not mean

legal team distorted the events and did not represent the legal battle correctly. *See id.*

18. *See Dugger, Taboos, supra* note 7.

19. *See Celia W. Dugger, New Law Bans Genital Cutting in United States, N.Y. TIMES*, Oct. 12, 1996, at A1 [hereinafter *New Law*].

20. *See id.*

21. *See id.*

22. *Id.*

23. *See infra* section II.D.

24. *See AMNESTY INTERNATIONAL, ANNUAL REPORT* 49-52 (1998).

25. For a very complete discussion of the tension that can exist between Western and non-Western humanitarian groups, see Lewis, *supra* note 1.

26. *See id.* at 18-20.

that change should not be effectuated. Many of the activists who work to eradicate FGM are part of African NGOs.²⁷ The fact that African NGOs are involved indicates that it is not just Western women who are opposed to FGM. Rather, African women are speaking out against an African ritual and working toward its eradication.²⁸ This indicates that the movement toward ending FGM is not just Western feminists imposing their own points of view on Africa.²⁹ If a culture were to advocate the ritual removal of a child's nose or hand, international human rights activists would raise an outcry.³⁰ Culture and tradition do not necessarily make a practice right, lawful or desirable. FGM should be seen as torture,³¹ cruel, inhuman and degrading treatment and child abuse.³²

A. THE DIFFERENT TYPES OF FEMALE GENITAL MUTILATION

FGM is rarely performed under sanitary conditions.³³ The procedure is usually performed by an old woman of the village using a razor blade, kitchen knife, penknife, broken glass, tin lid, scissors or some other sharp object.³⁴ Anesthetic is rarely used, which means that the girls often struggle or writhe in pain, thereby causing imprecise cuts.³⁵ Many sources have

27. See Amnesty International, *Section Nine: Female Genital Mutilation in Africa: Information by Country* (visited Feb. 17, 1999) <<http://www.amnesty.org/ailib/intcam/femgen/fgm9.html>> (documenting the various governmental and non-governmental action that has taken place throughout Africa to help eradicate FGM) [hereinafter AI, § 9].

28. See *id.*

29. See Joan R. Tarpley, *Bad Witches: A Cut on the Clitoris with the Instruments of Institutional Power and Politics*, 100 W. VA. L. REV. 297, 316 (1997).

30. See *id.*

31. See Liu, *supra* note 4, at 76.

32. See Tarpley, *supra* note 29, at 301.

33. See Bashir, *supra* note 4, at 421; see also MINORITY RIGHTS GROUP, *supra* note 6, at 3. More recently, there have been reports of FGM being carried out in hospitals in some countries like Mali. See *id.* at 6. While this would hopefully provide a more sanitary condition for the procedure, it is disturbing to think of licensed doctors performing a procedure that is so brutal, has no medical value and is so dangerous. See *infra* section II.C (describing the reality of FGM).

In 1996, a group of physicians from Harborview Medical Center in Seattle, proposed performing a ritual nick of the prepuce under local anesthetic, without removing any tissue. See Dugger, *Taboos*, *supra* note 7; Liu, *supra* note 4, at 86. Somali families living in Seattle had asked the doctors to perform FGM on their daughters. See Liu, *supra* note 4, at 86. The doctors felt that if the parents agreed to this type of procedure, the girls would be safer than if the parents attempted the procedure at home or took the girls to Africa to be mutilated. See *id.* The hospital abandoned the proposed procedure after numerous protests. See Dugger, *Taboos*, *supra* note 7. In addition, then Representative Patricia Schroeder (D-CO) wrote the hospital to warn them that she felt the proposed procedure violated United States law. See *id.*

34. See AI, § 1, *supra* note 2, at 2; Bashir, *supra* note 4, at 421 (questioning the eyesight of the old women); Tarpley, *supra* note 29, at 310 (reporting that the women occasionally use their fingernails to remove the clitoris); see also *supra* note 2 and accompanying text.

35. See Bashir, *supra* note 4, at 421.

described the different procedures used when performing FGM.³⁶ While some of the sources disagree about the classifications of FGM, all are fairly consistent in their explanation of the procedures. The four types of FGM include sunna, excision, infibulation and other unclassified forms of FGM.

1. Sunna

The least severe form of FGM, often referred to as "sunna,"³⁷ has been described by some commentators as the only form of FGM that can be properly called circumcision.³⁸ Sunna, which is performed on a small portion of women,³⁹ involves the removal of the prepuce, or hood, of the clitoris only.⁴⁰ However, no form of FGM, including sunna, can be equated to male circumcision.⁴¹ The goals and results of male and female circumcision are completely different since male circumcision does not involve the intent to remove the man's sexual desire.⁴²

36. See generally Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988); Bashir, *supra* note 4; Liu, *supra* note 4; Tarpley, *supra* note 29; MINORITY RIGHTS GROUP, *supra* note 6; AI, § 1, *supra* note 2.

37. From the Arabic word meaning "tradition." See Tarpley, *supra* note 29, at 309. It is important to note that depending on the traditions of the group, several varieties of FGM exist, which may involve more or less cutting, and may, therefore, fall in between these classifications. See *id.* at 309-11; Liu, *supra* note 4, at 77 n.36.

38. See MINORITY RIGHTS GROUP, *supra* note 6, at 3.

39. See *id.*

40. See Tarpley, *supra* note 29, at 309; Bashir, *supra* note 4, at 420; Liu, *supra* note 4, at 77; MINORITY RIGHTS GROUP, *supra* note 6, at 3.

41. See Liu, *supra* note 4, at 78; Bashir, *supra* note 4, at 420. According to Bashir, "FGM would only be similar to male circumcision if the penis were amputated." *Id.* However, there are some commentators and attorneys that argue that male circumcision needs to be outlawed as well. Attorney Zenas Bear sees male circumcision as male genital mutilation and is campaigning to eradicate the practice. See Interview with Zenas Bear (Apr. 17, 1999). Mr. Bear argues that not only does male circumcision serve no purpose, it actually harms male children. See *id.* According to the opponents of male circumcision, the foreskin actually helps to protect the child's penis and keep it clean. See NATIONAL ORGANIZATION OF CIRCUMCISION INFORMATION RESOURCE CENTERS, ANSWERS TO YOUR QUESTIONS ABOUT INFANT CIRCUMCISION (1997). In addition, the foreskin contains nerves that enhance sexual pleasure. See *id.* Therefore, male circumcision alters the male's sexual pleasure and sensation. See *id.*

42. See Liu, *supra* note 4, at 78 n.44. Ms. Liu quotes an Egyptian woman, Wedad Zenie-Ziegler, who stated:

There is no similarity between male circumcision, a prophylactic measure recommended for boys in almost every society and female circumcision, the goal of which is to diminish, if not suppress sexual desire in women. . . . FGM is not analogous to male circumcision because the latter involves the removal of the foreskin of the penis only, and not other genital tissue.

Id.

Even though sunna technically is only to remove the hood, or foreskin, of the clitoris, there is damage associated with even this "mild" procedure. Morgan, *supra* note 5, at 98. Morgan explains that "because the specialized sensory tissue of the clitoris is concentrated in a rich neurovascular area of a few centimeters, the removal of a small amount of tissue is dangerous and has serious and irreversible effects." *Id.* (citations omitted). In addition, the skill of the person performing the procedure varies greatly and the instruments used are not

2. Excision

The second major category of FGM is excision, which involves the removal of the clitoris, known as a clitoridectomy, and all or part of the labia minora.⁴³ In some cases, the labia majora may be cut as well, and may or may not be stitched together.⁴⁴ Excision, the most widespread form of FGM, is performed on approximately eighty percent of those affected.⁴⁵

3. Infibulation

The most severe form of FGM, infibulation, is performed on approximately fifteen percent of all women and girls who are mutilated.⁴⁶ In this procedure, the clitoris is removed, as well as the labia minora and at least two-thirds of the labia majora.⁴⁷ The raw edges of the labia majora are then stitched together with catgut, silk or thorns, and the girl is bound in cloth from her hip to her ankles and kept immobile, allowing the edges of the labia to heal together.⁴⁸ A small opening for the passage of urine and

precise. See *infra* section III.C.1; *supra* note 2 and accompanying text. This can lead to imprecise cuts that remove more tissue than expected. See Morgan, *supra* note 5, at 98.

43. See Tarpley, *supra* note 29, at 310; MINORITY RIGHTS GROUP, *supra* note 6, at 3; Bashir, *supra* note 4, at 420; Liu, *supra* note 4, at 77, n.38.

Amnesty International (AI) uses a slightly different classification. According to AI, clitoridectomy is a separate form of FGM that involves the removal of all or part of the clitoris. See AI, § 1, *supra* note 2, at 1. Excision involves the removal of all or part of the labia minora. See *id.*

44. See Tarpley, *supra* note 29, at 310. If the top of the labia majora were stitched together, the remaining vaginal opening would be smaller.

45. See *id.*

46. See AI, § 1, *supra* note 2, at 1. However, depending on the geographic location the percentage is much higher. For example, "an estimated [ninety-five percent] of women from all ethnic groups are infibulated" in Djibouti. AI, § 9, *supra* note 27, at 2. Almost all women in Somalia have been infibulated. See Liu, *supra* note 4, at 77 n.39. In some countries, infibulation is referred to as "pharaonic circumcision," indicating that that this form may date back to the time of the pharaohs. *Id.* However, in Egypt, this procedure is referred to as "Sudanese circumcision." MINORITY RIGHTS GROUP, *supra* note 6, at 6.

47. See AI, § 1, *supra* note 2, at 1; MINORITY RIGHTS GROUP, *supra* note 6, at 3.

48. See Bashir, *supra* note 4, at 421. The sutured labia will cover the urethra and the vagina. See *id.* "In some communities there is no stitching but, to facilitate healing, the raw edges of the wound are brought together by adhesive substances such as eggs, sugar or acacia tar and the girl is kept immobile . . ." Tarpley, *supra* note 29, at 310.

M.A.S. Mustafa recounted this description of an infibulation which took place in Djibouti:

The little girl, entirely nude, is immobilized in the sitting position on a low stool by at least three women. One of them with her arms tightly around the little girl's chest; two others hold the child's thighs apart by force, in order to open wide the vulva. The child's arms are tied behind her back, or immobilized by two other women guests. The traditional operator says a short prayer: "Allah is great and Mahomet is his Prophet. May Allah keep away all evils." Then she spreads on the floor some offerings to Allah: split maize, or in urban areas, eggs. Then the old woman takes her razor and excises the clitoris. The infibulation follows: the operator cuts with her razor from top to bottom of the small lip and then scrapes the flesh from the

menstrual blood is left by inserting a tiny piece of wood or a reed.⁴⁹ Occasionally antiseptic powder may be applied to the wound, but more usually a paste made of herbs, earth, dung, eggs or ashes is rubbed on the

inside of the large lip. This nymphetomy [excision of labia minora] and scraping are repeated on the other side of the vulva. The little girl howls and writhes in pain, although strongly held down. The operator wipes the blood from the wound and the mother, as well as the guests, "verify" her work, sometimes putting their fingers in. The amount of scraping of the large lips depends upon the "technical" ability of the operator. The opening left for urine and menstrual blood is miniscule. Then the operator applies a paste and ensures the adhesion of the large lips by means of an acacia thorn, which pierces one lip and passes through into the other. She sticks in three or four in this manner down the vulva. These thorns are then held in place either by means of sewing thread, or with horsehair. Paste is again put on the wound. But all this is not sufficient to ensure the coalescence of the large lips; so the little girl is then tied up from her pelvis to her feet: strips of material rolled up into a rope immobilize her legs entirely. Exhausted, the little girl is then dressed and put on a bed. The operation lasts from fifteen to twenty minutes according to the ability of the old woman and the resistance put up by the child.

MINORITY RIGHTS GROUP, *supra* note 6, at 3.

Some reports illustrate the unsanitary conditions in which the girls and women are kept while recovering from FGM. Often the bandages are not removed at all, forcing the girls and women to relieve themselves in the bandages. This can cause serious infections. As one young girl reported:

And then we went back to the house and they bind our two feet together, your legs like this, up here to your butt, so you don't break a stitch at night. Another thing I remember vividly was trying to pass urine. That was so difficult. I held it and held it and held it for three or four days, and I got a bladder infection, and my mother and everybody came, and they were trying to make me go to the bathroom and stuff, and finally one night I must have fallen out of my bed and crawled like this until I was under the dining room table, and they found me there in the morning with urine running all over the place, so I must have done it in the middle of the night.

Bashir, *supra* note 4, at n. 37. When girls are bandaged after the procedure, their excrement remains in the bandages with them. See Morgan, *supra* note 5, at 97. However, not all girls are kept in bandages after the procedure. See *id.*

49. See MINORITY RIGHTS GROUP, *supra* note 6, at 3; Tarpley, *supra* note 29, at 310. In some cultures, the smaller the opening that is left, the higher bride-price the girl will fetch. See Morgan, *supra* note 5, at 97. Unfortunately, the opening may be too small to allow menstrual blood to escape. According to Minority Rights Group:

Dr. Ollivier (a military doctor in Djibouti) describe[d] a sixteen-year-old girl brought to the hospital at one a.m. with unbearable abdominal pains. She had not menstruated for several months, and had not had intercourse, but her abdomen was swollen and sensitive, with signs of a uterus in labour. She was infibulated, with a minuscule opening. Penetration would appear to have been impossible, and there was no sign of beating of a [fetal] heart. Dr. Ollivier performed a disinfibulation (opening of the scarred vulva), and released 3.4 litres of blackish foul-smelling blood. There are other accounts of similar complications, with more tragic results: the increased size of the abdomen together with the absence of menstruation leads the family to think a girl is pregnant. She is therefore killed for the prestige of the family.

MINORITY RIGHTS GROUP, *supra* note 6, at 5.

genital area.⁵⁰ Local healers believe the paste will help stop the bleeding and facilitate healing.⁵¹

4. Unclassified FGM

Other forms of FGM fall into a fourth category, often referred to as "unclassified FGM."⁵² Various methods are used depending on the local custom, all of which involve some form of "pricking, piercing or incision of the clitoris and/or labia."⁵³ These practices are not as common, and vary from region to region.

B. HISTORICAL JUSTIFICATIONS FOR FEMALE GENITAL MUTILATION

As one woman stated, "[c]ircumcision makes women clean, promotes virginity and chastity and guards young girls from sexual frustration by deadening their sexual appetite."⁵⁴ There are numerous justifications for FGM, many focusing on a girl's passage into adulthood.⁵⁵ However, as the age at which FGM is performed decreases, this justification becomes less persuasive.⁵⁶ The reasons given in support of the practice of FGM form a complex, interwoven pattern of custom, religion, tradition and superstition.⁵⁷

1. Religion

Religion is one of the most commonly cited justifications for FGM.⁵⁸

50. See AI, § 1, *supra* note 2, at 2; Bashir, *supra* note 4, at 421; see also *supra* note 2 and accompanying text. In addition, in some cultures "the incision may be treated daily with a native soap, palm oil, vaseline, kerosene, or even engine oil." Bashir, *supra* note 4, at 421.

51. See AI, § 1, *supra* note 2, at 2.

52. See Tarpley, *supra* note 29, at 310; Liu, *supra* note 4, at 77 n.36.

53. Liu, *supra* note 4, at 77 n.36. Liu states that this form of FGM may also involve: [S]tretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping (angurya cuts) or cutting (gishri cuts) of the vagina; introduction of corrosive substances into the vagina to cause bleeding, or of herbs into the vagina with aim of tightening or narrowing the vagina

Id.

54. AI, § 1, *supra* note 2, at 5 (quoting Mrs. Njeri, a defender of female genital mutilation in Kenya).

55. See *id.* at 4.

56. See MINORITY RIGHTS GROUP, *supra* note 6, at 7. According to the Minority Rights Group, the ceremony surrounding the procedure is disappearing. See *id.* While the procedure used to be performed frequently with a large public ceremony, including singing, dancing and a special hut from which the girl would eventually emerge as a marriageable woman, not all cultures had such elaborate rituals. See *id.* In some cultures, the ceremony consisted of special food or clothes. See *id.* However, the age at which the procedure is performed is decreasing. See *id.* If FGM is performed on a baby or very small girl, it can hardly be said that she is then of marriageable age. See *id.* In addition, when FGM is performed on a young child, her status in the community is not appreciably altered after the procedure. See *id.*

57. See Slack, *supra* note 36, at 445.

58. See Morgan, *supra* note 5, at 94.

The procedure has been performed by Christians, Jews, Muslims, animists and atheists, but is most commonly performed in Muslim nations.⁵⁹ However, there is evidence of the practice of FGM dating back as far as the fifth century B.C., thereby predating both Islam and Christianity.⁶⁰ The practice does not exist in the teachings of any formal religion.⁶¹

2. Family Honor and Marriage

FGM has also been justified on the grounds that it preserves female virginity and the family honor.⁶² Proponents of the procedure claim that FGM reduces a woman's desire for sexual intercourse and, consequently, will reduce extra-marital affairs.⁶³ FGM is therefore a blatant form of control of a woman's body and sexuality.⁶⁴ Critics challenge the theory that FGM promotes chastity, because a woman can be "opened" and "closed" again.⁶⁵ Some commentators have even suggested that FGM, and infibulation in particular, can actually give women more chances to "misbehave" because they can have intercourse but then be "re-infibulated" before marriage so that their husbands will think they are marrying a virgin.⁶⁶

In many societies where FGM is performed, the woman will not be

59. See Liu, *supra* note 4, at 77. See also Bashir, *supra* note 4, at 424-25.

60. See Morgan, *supra* note 5, at 94.

61. See Slack, *supra* note 36, at 446. Some Muslim leaders support the practice of FGM, however, there is no Qu'ranic scripture which requires the procedure. See Liu, *supra* note 4, at 77. Some Christian leaders claim the Bible supports FGM because the book of Genesis suggests that all male children should be circumcised. See Morgan, *supra* note 5, at 95. However, critics note that the reference is to male children only, and that the Bible does not make circumcision a requirement of the Christian faith. See *id.*

62. See Liu, *supra* note 4, at 79; Slack, *supra* note 36, at 445-46.

63. See AI, § 1, *supra* note 2, at 5. Immigrants to the United States often see FGM as a way of preventing their daughters from engaging in many of the "vices" present in this country. See Morgan, *supra* note 5, at 96. One Ethiopian man living in Los Angeles stated: "In [the United States] you see a lot of young women unmarried, pregnant. Maybe if American girls were circumcised, this wouldn't happen. When you circumcise a woman, they're less active sexually and more interested in their schoolwork." *Id.*

64. See Slack, *supra* note 36, at 445-46.

65. See AI, § 1, *supra* note 2, at 5; Bashir, *supra* note 4, at 427. This means that the small opening left by the procedure would be opened when the woman had sexual intercourse, but she could then be "re-infibulated." Her future sexual partners might never know she was not a virgin.

66. See MINORITY RIGHTS GROUP, *supra* note 6, at 7. According to Minority Rights Group, "[c]ases are reported in Somalia, where most husbands are polygamous and where divorce is cheap, of women paid for, married, divorced, re-infibulated, paid for and married again five times or more." *Id.* The wedding night of an infibulated woman is extremely painful, since she must be "opened" by her husband before the marriage can be consummated. See *infra* section II.C. Therefore, every time the woman is divorced, she may be re-infibulated, and would then forced to endure excruciating pain when she remarried. The torture these women endure does not end with the first mutilation, but can continue indefinitely.

considered an adult or marriageable unless she has undergone FGM.⁶⁷ The procedure is also seen as a way of taming women and a way of enforcing the traditional gender roles necessary to preserve the family honor.⁶⁸ An African immigrant in California mutilated his three-year-old daughter because she was too wild, liked to play outside too much and had friends who were boys.⁶⁹ According to her father, FGM was necessary to "tame" her.⁷⁰

The virginity and reputation of a daughter is linked to the family honor.⁷¹ If a daughter is not mutilated, she may not be able to find a husband, and, thus, would tarnish the family honor.⁷² A Somali woman now living in the United States stated that "the honor of a Somali family lies between the legs of a woman."⁷³

3. Hygiene and Health

In many societies where FGM is performed, female genitalia are seen as unclean or dangerous, and thus, must be removed for hygienic reasons.⁷⁴ However, FGM, and particularly infibulation, have the opposite effect to that of promoting hygiene. Urine and menstrual blood often cannot escape through the tiny opening, thereby causing pain, infection and odor.⁷⁵ Some proponents of FGM also believe that the clitoris is poisonous and, thus, must be removed or it could harm the man during intercourse or kill a baby during birth.⁷⁶ In some cultures, women are seen as sterile until the clitoris

67. See AI, § 1, *supra* note 2, at 4-5; see also Bashir, *supra* note 4, at 426-27.

68. See Morgan, *supra* note 5, at 95-96.

69. See *id.* at 96.

70. See *id.* Parents also believe that it is their duty to have their children mutilated. See Dugger, *Taboos*, *supra* note 7. A Somali man, now living in United States with his family, stated that he would have his daughters infibulated, because if he did not he would have "failed [his] children." *Id.*

71. See Bashir, *supra* note 4, at 426-27.

72. See Slack, *supra* note 36, at 437. When Ms. Slack was in Mauritania, a family wanted to name its new-born daughter after her. See *id.* She was frightened that her namesake would be mutilated and discussed her fears with the baby's family. See *id.* The family, a well-respected and prominent family in the village, told her that they, too, had reservations about the procedure. See *id.* The family decided not to go through with the procedure. See *id.* At the time of the publication of the article, the girl was six, and had not been forced to undergo the procedure. See *id.* However, the family admitted that pressure from the villagers, or the inability to find a husband, may require the girl to be mutilated at a later date. See *id.*

73. See Bashir, *supra* note 4, at 427.

74. See AI, §1, *supra* note 2, at 5. In some cultures, the words for FGM "are synonymous with purification (tahara in Egypt, tahir in Sudan), or cleansing, (sili-ji among the Bambarra, an ethnic group in Mali). In some FGM-practicing societies, uncut women are regarded as unclean and are not allowed to handle food and water." *Id.*; see also MINORITY RIGHTS GROUP, *supra* note 6, at 7 (stating that in Egypt, "the uncircumcised girl is called 'Nigsa' (unclean)"). AI, § 1, *supra* note 2, at 5.

75. See MINORITY RIGHTS GROUP, *supra* note 6, at 8.

76. See Morgan, *supra* note 5, at 95. There are other groups who believe that the clitoris

is removed.⁷⁷ In addition, some believe that if the clitoris is not removed, it will continue to grow until it eventually touches the ground.⁷⁸ Finally, in some cultures, the clitoris is considered to be a male element in the female body and must be removed to ensure proper femininity.⁷⁹ These beliefs are contrary to Western medical knowledge, and the medical community has not recognized any health benefits associated with FGM.⁸⁰

Some proponents of FGM claim that the procedure enhances male sexual pleasure, and, therefore, will "enrich" the marriage.⁸¹ There is evidence, however, that not all men prefer mutilated women, especially if they are tightly infibulated.⁸² In fact, it can take up to three months to successfully consummate a marriage with a tightly infibulated woman.⁸³ In addition, these proponents of FGM ignore the pain that women feel during intercourse.⁸⁴ The husband's sexual pleasure is more important than the woman's body and comfort. This justification for FGM reinforces the notion that FGM is a way to control women's sexuality because FGM is supposed to enhance male sexual gratification while purposefully

"produces an 'offensive discharge' that may" be harmful. Slack, *supra* note 36, at 447.

77. See Slack, *supra* note 36, at 447.

78. See Morgan, *supra* note 5, at 95. Some cultures believe the clitoris will grow to the size of a penis if not removed. See Liu, *supra* note 4, at 79.

79. See Liu, *supra* note 4, at 79. Many of the justifications for FGM can be seen in a quote from an Egyptian woman reported by AI. AI, § 1, *supra* note 2, at 5. The woman was mutilated and was adamant that her daughters be mutilated as well. See *id.* She said:

We are circumcised and insist on circumcising our daughters so that there is no mixing between male and female An uncircumcised woman is put to shame by her husband, who calls her "you with the clitoris." People say [that] she is like a man. Her organ would prick the man

Id.

80. See Bashir, *supra* note 4, at 427.

81. See Morgan, *supra* note 5, at 96.

82. See *id.*; Bashir, *supra* note 4, at 427. There are also, some men who choose to marry women who have not undergone FGM. See Tarpley, *supra* note 29, at 324-25. One tragic case involved a young Egyptian woman who married a Sudanese man she met while he was studying in Cairo. The couple went to visit his family, and while there, he left for a couple days on business. See *id.* His female relatives knew she was not infibulated, and told her that if she did not have the procedure, sooner or later her husband would divorce her because all Sudanese men desired infibulated women. See *id.* Finally, the girl decided to be infibulated before her husband returned. See *id.* When her husband returned, he was very angry with his female relatives. See *id.* He explained why he had married an Egyptian woman who was not infibulated. See *id.* He then divorced his wife. See *id.* The young girl returned home, probably never to marry again. See ANNE CLOUDSLEY, WOMEN OF OMDURMAN: LIFE, LOVE AND THE CULT OF VIRGINITY 119 (1984). The Sudanese women may have guessed how her husband would react and may have intentionally produced this situation. See *id.* They would have been offended that the man had not chosen a Sudanese bride, and felt that it was immoral not to be infibulated. See *id.* Women who have not been infibulated, they would most likely believe, will be unfaithful to their husbands. See *id.* The Sudanese women may therefore have worried that the Egyptian woman would bring shame to their house. See *id.*

83. See Bashir, *supra* note 4, at 427.

84. See *id.*

destroying female sexual enjoyment.⁸⁵

4. Traditional Tribal Custom

Preservation of the tribe through traditional custom is another commonly cited reason for continuing the practice of FGM.⁸⁶ Some believe that FGM promotes social cohesion and tribal identity as do body piercing, painting and tattooing.⁸⁷ Others believe that it is simply tradition, and therefore cannot be altered.⁸⁸ According to a Somali proverb, stopping a tradition is the same as angering God.⁸⁹

The power of tradition is exemplified by a woman from Mali who did not want to have her three daughters infibulated.⁹⁰ The woman worked, and during the week, would often leave her daughters with their grandmother.⁹¹ When the children came to stay with the grandmother, she asked the mother if they had been infibulated.⁹² The mother replied "no," and explained to the grandmother that the children would not be forced to undergo the same procedure she herself had undergone.⁹³ One day, when she came to pick up her daughters, she was surprised they did not come to say hello.⁹⁴ The mother found the girls in their bedroom, lying on mats, their faces swollen from crying.⁹⁵ Before the girls could tell their mother what had happened, the grandmother said to the mother: "Don't you go disturbing MY grandchildren. They have been excised and infibulated this morning."⁹⁶

85. *See id.*

86. *See Slack, supra* note 36, at 448; AI, § 1, *supra* note 2, at 4.

87. *See Morgan, supra* note 5, at 95.

88. *See Bashir, supra* note 4, at 426. As one Egyptian woman stated when asked whether her daughters would undergo the procedure: "Of course I shall have them circumcised exactly as their parents, grandparents and sisters were circumcised. This is our custom." AI, § 1, *supra* note 2, at 4.

89. *See Bashir, supra* note 4, at 426. According to Slack, when asked why FGM continues to be performed "[v]ery often no other reason is given except that it is 'tradition.'" Slack, *supra* note 36, at 448. Other responses included, "It is our custom and we are powerless to stop it" and "Why should we stop doing it?" *Id.* at 449.

90. *See Slack, supra* note 36, at 449.

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *Id.* Many women report feeling betrayed by their mothers who usually participate in the procedure. Joan Tarpley reports the story of one such woman:

When I had the operation I was eight years old. I was taken back to Somalia and I had the operation performed. Because I was very young I did not know what was happening to me, what they were doing to me. They strip you. They open your legs apart and they have ladies holding every part of your body, even holding your mouth to prevent you from screaming. I still remember the pain to this day. My sister was circumcised first and straight after she was done I was done. In terms of what happened to us, we just use

5. FGM in Europe and the United States

Mental health and the curing of female sexual “deviancy” provided the justification for the practice of FGM in Europe and the United States. FGM, in particular clitoridectomy, was performed in Europe and the United States in the nineteenth century.⁹⁷ In nineteenth century England, clitoridectomy was considered to be of medical value in curing such illnesses as hysteria and excessive masturbation.⁹⁸ Surgeons in the United States adopted clitoridectomy and embellished on the procedure by combining the removal of the clitoris with the removal of the ovaries in an attempt to be more effective at preventing the illnesses.⁹⁹ One commentator estimates that thousands of women in the United States had this procedure performed in the 1870s.¹⁰⁰ By about 1910, the usefulness of FGM in treating “hypersexuality and masturbation” was questioned, and the

the term being “sewn up”, having the clitoris cut off and having been sewn up for us not to have any sexual intercourse or anything! I questioned my mother as to why she did it to me. She said she had to—that it is tradition, it is custom. Anyhow she said she was pressurized [sic] into it by grandparents and relatives. And I told her that we were her daughters and we could have died having this operation. The day before I was circumcised, a girl died in the next village and I still remember that. I said to her, you are risking your daughters’ lives for the satisfaction of men. When it is my turn to get married I will have to go to (the) hospital to have the operation undone. I feel whoever I marry, I do not want him to marry me because I am circumcised. For me, I feel my body has been used for somebody else. What is the point of all this except to cause me a lot of pain?

Tarpley, *supra* note 29, at 311.

97. See Tarpley, *supra* note 29, at 312-13. The earliest European mention of clitoridectomy is from Berlin in 1822. See *id.*

98. See AI, § 1, *supra* note 2, at 6. Edward Wallerstein reports that “[t]he ‘medical’ test for hypersexuality, proof of the need for clitoridectomy, was simple—and obscene. The patient’s breasts and/or clitoris were stroked. If orgasm was induced, this was proof positive of hypersexuality, and the need for surgery.” EDWARD WALLERSTEIN, *CIRCUMCISION: AN AMERICAN HEALTH FALLACY* 174 (1980).

99. See WALLERSTEIN, *supra* note 98, at 174. According to Wallerstein, Isaac Baker Brown, a well-respected gynecologist in the 1800’s, sought a surgical treatment for women’s mental problems. *Id.* at 172-73. According to Dr. Brown, all of women’s mental problems could be traced to masturbation, “which caused [eight] problems, starting with hysteria and spinal irritation, culminating in mania and death. The treatment was clitoridectomy.” *Id.* at 173. In 1894, a United States doctor apparently agreed with Dr. Brown. See *id.* at 174. He credited Dr. Brown in a medical journal where he reported performing a clitoridectomy on a seven-year-old girl because “she masturbated and was nervous and reluctant to answer questions.” *Id.*

The Minority Rights Group reports that infantile and adolescent masturbation is actually beneficial, because it “teaches the organism and the consciousness the proper function of the sexual reaction.” MINORITY RIGHTS GROUP, *supra* note 6, at 5. Therefore, “[t]he earlier a woman is mutilated, the greater is the damage There is no surgical technique capable of repairing a clitoridectomy, nor of the restoring erogenous sensitivity of the amputated apparatus.” *Id.*

100. See WALLERSTEIN, *supra* note 98, at 174.

occurrence of the procedure for these medical reasons ceased.¹⁰¹ However, as late as 1940, the Roman Catholic Church recommended the amputation or cauterization of the clitoris to cure the "vice of lesbianism."¹⁰²

C. THE REALITY OF FEMALE GENITAL MUTILATION

Although there are no known medical benefits from FGM,¹⁰³ the procedure is currently performed in twenty-eight African nations,¹⁰⁴ Yemen, Oman and the United Arab Emirates.¹⁰⁵ FGM is also performed by immigrants from those nations who now live in England, Germany, France, Australia, the United States and Canada.¹⁰⁶

1. Physical Complications

There are many complications associated with FGM and the imperfect conditions under which the procedure is performed. Common early side effects are severe pain and hemorrhaging, which can lead to shock and death.¹⁰⁷ In addition, other "complications include wound infections,

101. See Tarpley, *supra* note 29, at 313. However, certain cosmetic surgeries are still practiced in the United States. See Lewis, *supra* note 1, at 7 n.22. These surgeries are also invasive and alter the appearance of the genitalia, but are rarely described as mutilation. See *id.* Other Western practices, such as piercing, are also not described as mutilation. See *id.*

102. See WALLERSTEIN, *supra* note 98, at 174.

103. See Bashir, *supra* note 4, at 427.

104. See AI, § 9, *supra* note 27 (stating that the following countries perform FGM: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo and Uganda).

105. See AI, § 1, *supra* note 2, at 2. One commentator stated:

The African countries that practice FGM form a belt across the center of the continent from the Atlantic Ocean to the Red Sea, the Indian Ocean to the eastern Mediterranean This belt, with the exception of the Egyptian buckle, corresponds strikingly with the pattern of countries [that] have the highest child mortality rates.

Bashir, *supra* note 4, at 417, n.3.

Amnesty International reports that there are "no figures to indicate how common FGM is in Asia. It has been reported among Muslim populations in Indonesia, Sri Lanka and Malaysia In India, a small Muslim sect, the Daudi Bohra, practice clitoridectomy." *Id.* There are also some reports of FGM being practiced in Bahrain, Qatar and some areas of Saudi Arabia, although usually when the procedure is performed in the Middle East, it is by immigrant groups from Sudan and Somalia. See Tarpley, *supra* note 29, at 315, n.68. The extent of the practice in the Middle East is largely unknown. See *id.* There are also reports of FGM being performed in Israel by Bedouins and Ethiopian Jewish Falashas. See *id.* Some indigenous people of Peru, Columbia, Mexico and Brazil also reportedly perform clitoridectomy, but the extent of that practice is also unknown. See *id.*

106. See Tarpley, *supra* note 29, at 315; see also Slack, *supra* note 36, at 439 (stating that FGM is performed in various European and other Western countries).

107. See Bashir, *supra* note 4, at 422. Bashir discusses one young Somali woman whose procedure was performed with anesthesia, painkillers and antibiotics. However, the pain was still "unbearable." *Id.* at 422 n.41; see also MINORITY RIGHTS GROUP, *supra* note 6, at 5 (claiming that death can be avoided only if blood transfusions and emergency resuscitation

abscesses, ulcers, septicemia, tetanus, and gangrene.”¹⁰⁸

Long term physical problems include the formation of keloid scars,¹⁰⁹ ruptures in the vagina that can lead to incontinence later in life,¹¹⁰ dysmennorhea or “extremely painful menstruation,”¹¹¹ the development of neuroma, which could cause the entire genital area to become permanently too painful to even touch,¹¹² dyspareunia or extreme pain during sexual intercourse¹¹³ and sterility due to infections that can spread through the cervix and into the uterus, Fallopian tubes and ovaries.¹¹⁴ In addition, infibulated women can experience problems especially if the opening left is too small.¹¹⁵ The opening may be too small to allow menstrual blood to escape,¹¹⁶ or in some extreme cases, urine may not even be able to pass through the opening normally.¹¹⁷ Often, if a woman has been infibulated, it can take her ten to fifteen minutes to urinate.¹¹⁸ It is clear, therefore, that many women who undergo female genital mutilation continue to suffer daily pain throughout their lives.

are available).

108. Bashir, *supra* note 4, at 422. In addition, FGM is usually performed on a number of girls at a time without sterilization of the instruments. This can lead to the increased risk of other infections such as HIV. See AI, § 1, *supra* note 2, at 3.

While the most severe complications usually occur in areas where infibulation is prevalent, they can also occur when other “milder” forms of FGM are used. See Slack, *supra* note 36, at 451. Heavy bleeding and infection are still very prevalent, and there are the additional problems of the procedure often being performed by non-medical staff under unsanitary and poorly lit conditions, and the young girls struggle, which can lead to more tissue being removed than was intended or imprecise cutting. See *id.*

109. See Slack, *supra* note 36, at 452. Keloid scars are hard, raised scars that result when skin has been severely damaged and then loses its elasticity. See *id.* Keloid scars can grow to be so large that they obstruct walking. See *id.*

110. See *id.* This can lead to social problems, since in some societies, an incontinent woman may be “repudiated by her husband and shunned by society.” *Id.*

111. MINORITY RIGHTS GROUP, *supra* note 6, at 5.

112. See *id.*

113. See *id.* Tarpley reports that “some women have said that, because of lack of sensation, they feel they are abused each time they have sexual intercourse.” Tarpley, *supra* note 29, at 303.

Not all women report pain during intercourse. An Egyptian proponent of FGM stated that she, and other “circumcised” women (from the description of the procedure performed on her, it appears she was excised), enjoyed and were as satisfied by their sex life as much as their husbands. See MINORITY RIGHTS GROUP, *supra* note 6, at 14–15. Researchers have concluded, however, “that all orgasms in women originate in the clitoris, although they may be felt elsewhere. . . . Female orgasms are triggered by the stimulation of the clitoris, whereas they are expressed by vaginal contractions.” *Id.* at 5.

114. See MINORITY RIGHTS GROUP, *supra* note 6, at 5.

115. See Slack, *supra* note 36, at 452; see also *supra* note 49 and accompanying text (describing that some cultures attempt to make the opening as small as possible).

116. See *supra* note 49 and accompanying text.

117. See Slack, *supra* note 36, at 452.

118. See *id.* These women must force the urine out drop by drop. See *id.* There have been some women who have reported “requiring up to two hours to empty their bladders.” *Id.*

Furthermore, if a girl is infibulated before marriage, her wedding night will be agony. Frequently, it can take several weeks for the man to be able to penetrate the woman.¹¹⁹ In some countries, such as Somalia, the bride is made to lie still to prevent the newly opened labia from healing back together, and tradition dictates that the newly married couple should have prolonged and repeated intercourse over eight days.¹²⁰ There are reports of men using daggers or razor blades to open their wives on their wedding night.¹²¹ Therefore, the torture that mutilated women endure continues after the actual procedure.

Some women attempt to go to clinics, or local midwives, and say they are expecting a child, in the hope that the health care provider might open them up surgically.¹²² However, it is not always possible to get a health care provider to agree to perform such a procedure. A young woman from Mali reported being terrified at the thought of her husband using a knife to open her on her wedding night.¹²³ She had been infibulated as a baby and did not remember having had the procedure performed.¹²⁴ Not until she was twenty and about to be married did she become aware of her condition. She was "overcome with a feeling of revulsion"¹²⁵ and decided she wanted to be opened surgically in a clinic.¹²⁶ Both doctors and midwives steadfastly refused to perform the procedure.¹²⁷ One doctor said to her:

119. See *id.* at 453. Sudanese women "reported going through a great deal of suffering during a process of gradual penetration which lasted an average of [two to three] months. Quite a few suffered tearing of surrounding tissues; hemorrhage was common, as were infections and psychic trauma." *Id.* Many have speculated that these open wounds also facilitate the spread of HIV. See *id.*

120. See *id.*

121. See MINORITY RIGHTS GROUP, *supra* note 6, at 3. In Somalia, one tradition dictates that "[t]he morning after the wedding night, the husband puts his bloody dagger on his shoulder and makes the rounds in order to obtain general admiration." *Id.* There are also reports that in Somalia, men often use their fingers to rip open their brides on their wedding night. See Slack, *supra* note 36, at 453.

Different cultures have different wedding rituals. Slack reports that one ritual is performed by the husband's family.

[T]he husband's mother or grandmother measures his penis, makes a wooden replica of the same size, and cuts the infibulated opening of the bride accordingly. "The opening is just big enough to allow penetration, which has to take place frequently during the early days and weeks of the marriage to prevent the open wound from closing again." The medical results of this re-injury to the genital area are similar to the initial operation: infection, hemorrhage, injury to adjacent areas, keloid formation, and severe pain.

Id.

122. See Slack, *supra* note 36, at 453.

123. See MINORITY RIGHTS GROUP, *supra* note 6, at 13.

124. See *id.*

125. *Id.*

126. See *id.*

127. See *id.*

"You want to live a life of debauchery, and for that you are asking my complicity?"¹²⁸ The young woman was not able to convince anyone to help her, and as she said: "At last, on the eve of my wedding, I had to face my ill fortune and submit to it."¹²⁹

Childbirth is a dangerous event for women who have undergone FGM, especially infibulated women.¹³⁰ Doctors in the West may not be used to treating infibulated women, and may not recognize the dangers.¹³¹ Fetal and maternal death,¹³² brain-damaged babies¹³³ and severe internal damage to the mother¹³⁴ are often associated with women who have undergone FGM, and particularly infibulation. Many cultures that perform FGM do not attribute these consequences to its practice.¹³⁵ If the mother or baby dies, often that is attributed to fate or the gods' wishes, not to the physical problems associated with FGM.¹³⁶ To blame the procedure of FGM would

128. *Id.*

129. *Id.*

130. See Bashir, *supra* note 4, at 423-24.

131. *Id.* A story, reported by the Washington Post, of a fifteen-year-old Somali girl provides an example of some of the problems pregnant women can experience.

She is only [fifteen]. Pregnancy was supposed to have been physically impossible; when she was just a little girl in Somalia, elders with sharp instruments and makeshift sutures and herbal potions had supposedly assured that. She went into labor about 9 in the morning. Her water broke about 11. So when she got to the hospital about 4 p.m., she was quite far along. Doctors looked between her legs and gasped . . . They'd never seen such a thing, they said. What was it? How did it open? Throughout the delivery, the attending physician kept a pair of scissors in her hand, snipping here and there around the thick, unyielding keloid scarring characteristic of people of African ancestry. Her sister said she was no expert, but that at home they cut upward and sideways. No, that can't be so, the doctors told her. When the baby's head finally ripped through, the new mother was a pitiable, jagged wound. It took an hour and a half to sew her back up. That is when she lost it. Though she had shown courage and stoicism that belied both her age and her terror, repeated injections of painkillers could not stop her screaming.

Id. at 416. As this report demonstrates, women who have undergone FGM, particularly infibulation, are at an increased risk of problems for the rest of their lives. These women endure pain and suffering when the procedure is performed, on their wedding night and with every subsequent childbirth, because they have to be opened, and then are often closed back up again, so that each future pregnancy is as painful and as dangerous as the first. See Slack, *supra* note 36, at 453-54.

132. See MINORITY RIGHTS GROUP, *supra* note 6, at 5. The hardened tissue or the small opening may obstruct the birth passage. This can cause tearing in the vaginal area, hemorrhaging or a ruptured uterus and fistulas (unnatural passages) may be created as the baby is pushed out of the uterus. Without proper medical care, these conditions can be fatal to both the mother and baby. See Slack, *supra* note 36, at 453-54.

133. See Bashir, *supra* note 4, at 423-24. Brain damage would occur as a result of lack of oxygen to the baby's brain. This can be caused by the prolonged and obstructed labor. See Slack, *supra* note 36, at 453.

134. See Slack, *supra* note 36, at 453.

135. See *id.* at 454.

136. See *id.*

be contrary to the beliefs surrounding the practice. Many cultures believe FGM actually helps fertility and childbirth.¹³⁷ Therefore, education is of utmost necessity in the fight to eradicate this procedure.¹³⁸

However, it is important to recognize that not all people who have undergone FGM think they have been mutilated, or think of FGM negatively. Some women fondly remember the ceremony surrounding the procedure and the pride they felt on becoming "women."¹³⁹ An Egyptian woman remembers being filled with fear when she found out she would be excised.¹⁴⁰ She tried to run, but one of the women caught her, and held her down. She remembers the procedure being painful, and she screamed, but then fell asleep, and felt fine after two hours. Her aunt offered her special food for a week.¹⁴¹ Later, all the girls who had undergone the procedure linked arms and walked around with their legs spread apart to show they had been "circumcised."¹⁴²

2. Psychological Complications

FGM can cause severe psychological problems as well. While there has been relatively little research on the psychological problems associated with FGM,¹⁴³ there have been studies that indicate extreme and enduring pain can cause lasting psychological problems.¹⁴⁴ Some researchers have

137. See *supra* notes 76-77 and accompanying text.

138. The Sabiny tribe of eastern Uganda recently undertook an extensive educational campaign against FGM, which had been the traditional practice of their tribe. See Barbara Crossette, *A Uganda Tribe Fights Genital Cutting*, N.Y. TIMES, July 16, 1998, at A8. The tribal elders met to evaluate their customs and traditions, and decided some needed to be abandoned. See *id.* Parents were educated about the harmful effects of the procedure itself, the risks that can be posed later in life and the risks to babies being born to mutilated mothers. See *id.* In an interview with *New York Times* reporter Barbara Crossette, G.W. Cheborian, chairman of the Sabiny Elders Association, a council of clan leaders, said he wanted to preserve the Sabiny culture, but not at the expense of young girls' lives. See *id.* Instead of FGM, the girls will participate in a symbolic ritual declaring them women. In addition, Mr. Cheborian said that he is working on other ways of preserving, and enhancing, their cultural traditions, such as the creation of a written Sabiny language. See *id.* Mr. Cheborian feels that other cultures that still engage in FGM "should come forward and be faithful to their children, not endanger them, not put them into hardship." *Id.*

139. See MINORITY RIGHTS GROUP, *supra* note 6, at 14-15.

140. See *id.* at 14.

141. See *id.*

142. See *id.* at 15.

143. See *id.* at 6. According to this source, the complete psychological effects of FGM are not known. There are many theories:

But the fact is that in psychiatric or psycho-analytic terms, we simply do not know. We do not know what it means to a girl or woman when her central organ of sensory pleasure is cut off, when her life-giving canal is stitched up amid blood and fear and secrecy, while she is forcibly held down and told that if she screams she will cause the death of her mother, or bring shame on her family.

Id.

144. See Slack, *supra* note 36, at 454. However, the severity of these problems depends

concluded that the severe pain of FGM, concentrated in such a sensitive and delicate area, and performed during early formative years, does cause psychological problems.¹⁴⁵ In addition, many girls experience fear and anxiety when they first learn they will have to undergo the procedure.¹⁴⁶ The procedure itself is also frightening; the young girls are held down, sometimes gagged, their legs are spread apart, and they are cut without anesthesia.¹⁴⁷ Often, their mother or some other female relative is involved, which can add a sense of immense betrayal as well.¹⁴⁸

FGM has also been associated with psychological problems surrounding sexual intercourse, although the connection has not been conclusively determined.¹⁴⁹ According to some studies, women who have experienced FGM are often "afraid of sex, experience extreme pain from the act, and receive little, if any, enjoyment from sexual relations."¹⁵⁰ Again, it is important to recognize that some women view having no sexual desire in a positive light. For example, an educated woman from Mali sees FGM as a form of liberation.¹⁵¹ This woman is happy that she feels no sexual desire because this permits her to be truly in control of her own body.¹⁵²

on a variety of factors, including "the child's inner defenses and the prevailing psychosocial environment." *Id.* (quoting *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, U.N. ESCO Commission on Human Rights, 42d Sess., Agenda Item 19, U.N. Doc. E/CN.4/42 (1986)).

145. *See id.*; *see also* MINORITY RIGHTS GROUP, *supra* note 6, at 5.

146. *See* Slack, *supra* note 36, at 454; *see also supra* notes 2, 90-96 and accompanying text (describing reports of women who felt these emotions).

147. *See id.*; *see also* AI, §1, *supra* note 2, at 2; *supra* text accompanying note 96.

148. *See* AI §1, *supra* note 2, at 4, 6; *supra* text accompanying note 96.

Nawal El Saadawi reports that one Egyptian woman felt she was being kidnapped when she was taken out of her bed in the middle of the night. NAWAL EL SAADAWI, *THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD* 7-11 (Sherif Hetata trans. 2 ed., 1982). She was carried to the bathroom, and could hear a knife being sharpened. *See id.* Someone put their hand over her mouth. *See id.* She screamed in "pain despite the tight hand held over [her] mouth, for the pain was not just a pain, it was like a searing flame that went through [her] whole body." *Id.* at 8. Afterwards, she lay crying and calling for her mother. *See id.* When she opened her eyes, she was horrified to find her mother standing there with the strangers, smiling and talking to them. *See id.*

149. *See* Slack, *supra* note 36, at 455.

150. *Id.*; *see also* sources cited *supra* note 113; MINORITY RIGHTS GROUP, *supra* note 6, at 15. It should be noted that in many societies where FGM is performed, sex is not something women are supposed to enjoy, and FGM is often performed in order to ensure that women do not enjoy sex. *See* Slack, *supra* note 36, at 455. Therefore it could be argued that it is not the performing of FGM that negatively affects women's sexual desire, but rather socialization.

151. *See* MINORITY RIGHTS GROUP, *supra* note 6, at 13.

152. *See id.* *But see supra* note 105 (explaining that some women report they enjoy sex even after FGM).

D. FEMALE GENITAL MUTILATION AND DOMESTIC LEGISLATION

1. The United States

In 1996, the United States Congress passed a law that stated in relevant part that "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined . . . or imprisoned not more than 5 years, or both."¹⁵³

This law, however, has been criticized primarily for four reasons.¹⁵⁴ First, the law contains exceptions that some argue defeat the purpose of the law.¹⁵⁵ There is no criminal penalty when the procedure is "necessary to the health of the person on whom it is performed" as long as it is "performed by a person licensed in the place of its performance as a medical practitioner."¹⁵⁶ There is also an exception to ensure that the legislation does not encompass episiotomy, or the incisions that are sometimes made in the tissue below the vaginal opening during childbirth.¹⁵⁷ Some have argued that this exception, which states the law will not be violated if it is "performed on a person in labor or who has just given birth and is performed by a . . . medical practitioner, midwife, or person in training to become such a practitioner or midwife,"¹⁵⁸ is too broad.¹⁵⁹

There are times when Western doctors truly believe that the procedures they are performing are medically necessary, such as repairing tears in the vaginal canal after childbirth. However, the U.S. law does contain some very broad exceptions, which may not be necessary.¹⁶⁰ There could be some forms of mutilation that occur in this country that would not be

153. 18 U.S.C. § 116(a) (1996). For an analysis of the law, its legislative history and potential obstacles to its implementation, see generally Erika Sussman, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 CORNELL INT'L L.J. 193 (1998).

154. See Tarpley, *supra* note 29, at 306-07. In addition, anti-FGM laws have been criticized on equal protection grounds. See Interview with Zenas Bear (Apr. 17, 1999). Zenas Bear, an attorney in Minnesota, filed an equal protection claim against the state's anti-FGM laws, claiming that male circumcision was not covered, and therefore the law violated the male children's right to equal protection of the laws. See *id.* The case was dismissed for lack of standing. See *id.*

155. See Tarpley, *supra* note 29, at 306-07.

156. 18 U.S.C. § 116(b)(1) (1996). According to Tarpley: "These subsections can be read as validating circumcision if it is necessary to the female's psychological health because without an excision of her genitalia she will be ostracized in her cultural community." Tarpley, *supra* note 29, at 306.

157. See TABER'S CYCLOPEDIA MEDICAL DICTIONARY 492, 1072 (14th ed. 1981). These incisions are sutured after childbirth.

158. 18 U.S.C. § 116(b)(2) (1996).

159. See Tarpley, *supra* note 29, at 306. Tarpley argues that the "exception allows virtually anyone to perform the procedure at the time of childbirth." *Id.*

160. See *id.*

considered illegal because of these exceptions.¹⁶¹ However, these exceptions may be necessary to prevent an attack claiming that the law is over-broad.¹⁶²

Second, the law does not provide a way to penalize parents who may not perform the procedure themselves; thereby missing an entire group who can harm young girls.¹⁶³ While the law, as written, may have an effect on the practitioner, it has no effect on the parents, who may decide to take their child out of the country to have the procedure performed. The United States should consider altering the law to include those who initiate the procedure, such as the parents, thereby making parents accountable for the well being of the child.¹⁶⁴ Current child abuse laws could also be read in such a way as to encompass FGM.¹⁶⁵

Third, the educational spending provision was deleted thereby eliminating some of the educational programs that many believe are essential to the eradication of FGM.¹⁶⁶ The deleted educational provisions would have required that immigrants be given information regarding the harm, both physical and psychological, FGM can cause as well as the potential legal ramifications in the United States.¹⁶⁷

Finally, the law does not provide for a civil remedy where damages could be sought.¹⁶⁸ The burden of proof in a criminal case is higher than in a civil case, and therefore, women and girls would be more likely to prevail in a civil case. In addition, a civil remedy would allow for the recovery of cash compensation or injunctive relief.

2. Europe and Other Countries

The United States is not alone in outlawing FGM. Canada,¹⁶⁹ the Netherlands,¹⁷⁰ France¹⁷¹ and Belgium¹⁷² all punish FGM as child abuse.¹⁷³

161. See *id.*; see also *supra* notes 160-63 and accompanying text.

162. See Tarpley, *supra* note 29, at 344-45. One could attempt to argue that if the law did not contain the medical exceptions, legitimate medical procedures would be inadvertently made illegal, and therefore the law would be over-broad.

163. See *id.* at 306-07.

164. See *infra* section II.D.2 & 3 (discussing other countries and their actions to hold parents accountable).

165. See *infra* section II.D.2 (discussing how other countries have used child abuse laws to help eradicate FGM).

166. See Tarpley, *supra* note 29, at 305-07.

167. See *id.* at 307 n.37.

168. See *id.*

169. See *Female Genital and Sexual Mutilation: A Global Review of Legislation to Prohibit FGM*, WOMEN'S INT'L NETWORK NEWS, Oct. 31, 1996, at 1.

170. See *id.* at 2.

171. See *id.* at 1. France has outlawed violence that leads to grievous bodily injury of a child under age fifteen. See *id.* FGM has been held to be such a type of violence. See *id.* France was "the first nation to bring criminal charges against those who perform" FGM. Marliese Simons, *Mutilation of Girls' Genitals: Ethnic Gulf in French Court*, N.Y. TIMES, Nov. 23, 1993, at A13. While many countries have passed laws making FGM illegal, as of

Some European countries, such as Great Britain, Sweden and Switzerland have explicitly outlawed FGM,¹⁷⁴ while others, such as Denmark and Germany, consider FGM implicitly illegal under currently existing laws.¹⁷⁵ Australia and New Zealand have also passed laws outlawing FGM.¹⁷⁶

3. Africa

There has also recently been a movement in Africa to outlaw FGM. Burkina Faso, the Central African Republic, Djibouti, Egypt, Ghana, Guinea and Sudan all have some type of legislation outlawing FGM.¹⁷⁷ Sudan was the first nation to outlaw FGM in 1946.¹⁷⁸ However, the 1993 Sudanese Penal Code does not mention FGM, making its legal status unclear.¹⁷⁹ The government of Ivory Coast is currently drafting legislation outlawing FGM.¹⁸⁰ In addition, the government of Eritrea has undertaken many campaigns aimed at abolishing FGM.¹⁸¹

Egypt's law outlawing FGM has recently attracted much attention. In 1997, Egypt's highest court upheld the law banning FGM.¹⁸² Islamic conservatives who claimed the practice was a religious issue, "and not a matter for the government or the courts," had filed the case.¹⁸³ According to the court, "[c]ircumcision of girls is not an individual right under Sharia [Islamic religious law] There is nothing in the Koran that authorizes it."¹⁸⁴ According to Ms. Abdel Halim, a Sudanese attorney based in New York who has helped African women campaign against FGM, the ruling is significant because many people look to Egypt as the center of Islamic scholarship and jurisprudence.¹⁸⁵ FGM, however, is still practiced in twenty-one other African nations where no relevant legislation exists.¹⁸⁶

the mid-1990s France was the only country to have prosecuted any cases. See Liu, *supra* note 4, at 76 n.31.

172. See Bashir, *supra* note 4, at 433 (citing Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 NEW ENG. J. MED. 712, 715 (1994)).

173. See Liu, *supra* note 4, at 75 n.22-25.

174. See *id.* at 75 n.27.

175. See *id.* at 75 n.26.

176. See *id.* at 76 n.28.

177. See AI, § 9, *supra* note 27.

178. See *id.* at 9.

179. See *id.*

180. See *id.* at 2.

181. See *id.* at 3.

182. See Barbara Crossette, *Court Back's Egypt's Ban On Mutilation*, N.Y. TIMES, Dec. 29, 1997, at A3.

183. *Id.*

184. *Id.*

185. See *id.*

186. See AI, § 9, *supra* note 27.

E. THE ROLE OF CULTURE: FEMALE GENITAL MUTILATION AS PART OF A GREATER SYSTEM OF DISCRIMINATION AGAINST, AND SUBJUGATION OF, WOMEN

Undoubtedly, one of the reasons why FGM is a difficult subject is that it touches the very fabric of our existence—sexuality. FGM removes the sexual identity of women. It is a form of subordination, degradation and humiliation that teaches women to be docile and accept custom.¹⁸⁷

FGM is not usually seen as a form of torture. While the Board of Immigration Appeals did grant Fauziya Kassindja's asylum request, it did so on very limited grounds.¹⁸⁸ Although the decision has been hailed as a landmark victory for women's rights groups and women seeking asylum in the United States, it is not clear how many other women will benefit from this case.¹⁸⁹

The decision rested on the fact that Ms. Kassindja had not yet had the procedure performed.¹⁹⁰ The implication from the holding of *In Re Kasinga* is that women who have had the procedure performed cannot claim asylum.¹⁹¹ This is in line with the standard way of thinking in most Western countries regarding FGM: once a woman has been mutilated, the mutilation cannot occur again, and her suffering is over. This is clearly not true. The suffering continues long after the initial procedure is performed.¹⁹² Society must change the way it views attacks on women's sexuality.

It is clear that FGM is performed to control women's sexuality; that is, in fact, often one of the reasons given for FGM.¹⁹³ It is no coincidence that in many of the countries where FGM is performed, women are often viewed as socially inferior to men.¹⁹⁴ Women are dependent on their husbands for their social status, economic well being and livelihood.¹⁹⁵ These societies are highly patriarchal, and women are taught their social

187. See Tarpley, *supra* note 29. A father of Eritrean descent was so concerned that his three-year-old daughter was becoming too sexually precocious that he cut out her clitoris himself. See Tarpley, *supra* note 29, at 306. This is not to imply that parents who perform FGM on their children have a malicious intent. They believe they must subject their children to FGM. See *supra* note 70.

188. See Linda A. Malone, *Beyond Bosnia and In re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B.U. INT'L L.J. 319, 336 (1996).

189. See *id.*

190. See *id.* at 333-34; see also Musalo, *supra* note 14 (providing a detailed analysis of *In re Kasinga* and its future applicability); *supra* note 15 (listing various articles that have discussed the case).

191. See Malone, *supra* note 188, at 336-37.

192. See *supra* section II.B. & C.

193. See *supra* notes 54, 62, 63, 68-70 and accompanying text.

194. See Tarpley, *supra* note 29, at 337-38.

195. See *id.*

roles from a very early age.¹⁹⁶ FGM needs to be seen as a part of a larger system of discrimination, domination and control of women. The international community has begun the process of addressing these problems through the passage of international laws.

III. FEMALE GENITAL MUTILATION VIOLATES INTERNATIONAL LAW

Female genital mutilation violates many international laws, covenants and declarations.¹⁹⁷ There are, however, certain problems inherent in using international law to address a problem that has traditionally been seen as a private matter.

A. PROBLEMS WITH USING INTERNATIONAL LAW

1. Enforcement

One of the biggest problems with using international law to address the problem of FGM is enforcement. Many of the international codes that condemn violence against women are covenants, which require ratification before they can be enforced, or are declarations, which have minimal powers of enforcement.¹⁹⁸ However, this is not to imply that declarations are not useful. They serve an important expository function because they

196. See *supra* note 69 (reporting that a father had his daughter mutilated because she played outside too much and had friends who were boys).

197. See *infra* section III.A.1.

198. See *infra* section III.B (discussing various United Nations documents).

Conventions or covenants are only enforceable for parties who have ratified, or signed onto, the convention, whereas declarations have no enforcement power. Many nations, including the United States, have not ratified some women's rights documents such as the Convention on the Elimination of All Forms of Discrimination Against Women. See United Nations Web Page on Human Rights (providing transcripts of all the major covenants, and lists of state-party signatories) (visited on March 23, 2001) <<http://untreaty.un.org>>. The United States is one of only two nations in the world that has not signed the Convention on the Rights of the Child. See United Nations High Commissioner for Human Rights Web Page (visited on March 23, 2001) <<http://www.unhchr.ch>>. The other nation is Somalia, which does not currently have a government. See *id.*

When nations such as the United States do not sign onto these covenants or declarations, it weakens the power of the document. If the United States were to ratify a document, it would set a valuable example that a politically important nation such as the United States was willing to support the rights enumerated in the document. Similarly, if the United States does ratify a document, it is vital that they not only follow the document, but also that they abide by international court decisions. When a country ratifies certain documents, it often subjects itself to the jurisdiction of the international court system that is responsible for enforcing that document. When the United States ratifies a document, then violates that document, and does not abide by the international court decision, it weakens the power of the court and the document. The United States can be seen as setting an example that the jurisdiction and power of the court is not applicable to that country, and other countries may then begin to wonder why the court should have power to decide cases in which they are involved.

establish that violence against women and children is not acceptable in the international community.¹⁹⁹ This can help to legitimize the work of women's advocacy groups and to increase awareness of the situation.

Covenants and conventions can be weakened by state reservations.²⁰⁰ However, even with reservations, covenants can be useful for women seeking to protect their rights.²⁰¹ Countries that have ratified certain conventions are bound by their terms. In addition, these conventions can be used as a model of how countries should behave.²⁰² Therefore, conventions can become a type of measurement for how states ought to treat their citizens, which is particularly relevant for women. Some commentators have argued that no country decides its foreign policy strategy based on how a certain country treats women.²⁰³ This needs to change if women's rights are going to be guaranteed. There are many international documents that ensure non-discrimination and equality.²⁰⁴ These documents and their non-discriminatory clauses need to be treated with the same legitimacy as clauses providing for civil and political rights if women's rights are going to be protected.

Many commentators argue that the problems of enforcement can be successfully addressed by establishing international tribunals or a permanent international criminal court.²⁰⁵ It is necessary to have an impartial, neutral judge, and many argue that this is not possible on a domestic level.²⁰⁶ An international criminal court or tribunal would be able to enforce the terms of the conventions or covenants²⁰⁷ enabling women who have undergone, or who may undergo FGM, redress in an international setting. The international setting is essential to ensure impartial, neutral judges. Local courts may be steeped in custom or tradition, possibly subconsciously, and may therefore not enforce certain

199. See Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139, 160 (1995).

200. See *id.* at 150 (stating that "Reservations permit states that sign a convention to make exceptions for themselves, typically on the basis of religion or custom, regarding specific parts of the convention.").

201. See *id.* at 160.

202. See *id.* at 160-61.

203. See *id.* at 154.

204. See, e.g., ICCPR, *infra* note 225; CEDAW, *infra* note 222, DEVAW, *infra* note 223.

205. See Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L.J. 255, 286-87 (1994); see, e.g., Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737 (1998). For a more detailed discussion of international criminal courts and how they can be effective in eradicating FGM, see *infra* section III.C.

206. See Levy, *supra* note 205, at 287.

207. The court would only have jurisdiction to enforce the terms of a convention that had been ratified by the country involved in litigation. See Akhavan, *supra* note 205.

women's rights they see as contradictory to the local custom or tradition.²⁰⁸ A woman bringing a claim in an international court would have a greater chance of being heard and having her rights enforced.²⁰⁹

2. The Public/Private Dichotomy

FGM is often seen as a private matter; the girl's parents are the ones who insist she undergo the procedure, and it is often controlled by local custom.²¹⁰ Private matters are often seen as falling outside of the realm of international law, which is limited to public action.²¹¹ Therefore, "[s]tates usually do not bear responsibility for the acts of private individuals against one another."²¹² Many commentators argue that this requirement poses a significant barrier to establishing gender-based rights.²¹³ The international community has tended to relegate sexual abuse to the "private" or "domestic" sphere, over which it has no jurisdiction.²¹⁴

There is, however, growing precedent to hold state actors accountable for a failure to ensure human rights, and for violations of human rights when the state had knowledge of the abuse but did nothing to prevent it.²¹⁵ State inaction therefore becomes complicit action.²¹⁶ Many countries where FGM is regularly performed have passed laws abolishing FGM;²¹⁷ however, prosecutions are rare even in Western countries.²¹⁸ It is obvious that the legislatures of the various countries are aware of the problem because they have passed laws abolishing FGM. Their failure to prosecute can therefore be seen as a violation of international law because they are not trying to remedy the problem with sufficient vigor.

Even more obvious state action can be seen in the case of Sierra Leone. According to Amnesty International, "[i]n July 1997, Sierra Leone's military ruler, Major Johnny Paul Koroma, who came to power following a military coup in May 1997, assured supporters of FGM that he supports this [sic] and other traditional practices."²¹⁹ Sierra Leone ratified the

208. *See id.*

209. *See infra* section III.D.2 (discussing the role of international courts).

210. *See supra* sections II.A & B (discussing the types of FGM and the justifications for the procedure).

211. *See Etienne, supra* note 199, at 157.

212. *Id.*

213. *See id.* at 157-58.

214. *See id.* at 158.

215. *See generally* Velasquez Rodriguez Case, Case 7920, Ser. C., No. 4, Inter-Am. Ct. H. R. 35, O.A.S. Doc. OEA/Ser.L/V/III.19, doc. 13 (1988) (judgment of July 29, 1988).

216. *See* Ursula A. O'Hare, *Realizing Human Rights for Women*, 21 HUM. RTS. Q. 364, 395-96 (1999).

217. *See supra* section II.D. (discussing legislation passed by countries such as Egypt where ninety-seven percent of all women are subjected to FGM); *see also*, AI, § 9, *supra* note 27, at 3.

218. *See supra* note 169.

219. AI, § 9, *supra* note 27, at 8.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1988.²²⁰ Sierra Leone is, therefore, bound by that Convention, and state leaders could be held accountable for their encouragement of FGM. Currently, in Sierra Leone, eighty to ninety percent of women and girls undergo some form of FGM.²²¹ The leaders of Sierra Leone must recognize the obligation to protect women under CEDAW.

B. APPLICABLE UNITED NATIONS COVENANTS AND TREATIES

Numerous United Nations conventions are applicable to female genital mutilation, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²²² the Declaration on the Elimination of Violence Against Women (DEVAW),²²³ the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),²²⁴ the International Covenant on Civil and Political Rights (ICCPR),²²⁵ the International Covenant on Economic, Social and Cultural Rights (ICESCR)²²⁶ and the Convention on the Rights of the Child (Child's Convention).²²⁷

1. Convention on the Elimination of All Forms of Discrimination Against Women

This Convention was the first document to specifically address and prohibit discrimination against women.²²⁸ CEDAW provides that women

220. See United Nations Web Page on Human Rights, *supra* note 198.

221. See AI, § 9, *supra* note 27, at 8. According to Amnesty International, excision is the most commonly performed type of FGM in Sierra Leone. See *id.* There are no laws currently in effect in Sierra Leone to address the practice. See *id.*

222. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (1980) *adopted* Dec. 18, 1979, *entered into force* Sept. 3, 1981, *reprinted in* 19 I.L.M. 33 (1980) [hereinafter CEDAW].

223. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, 48 U.N. GAOR Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993) [hereinafter DEVAW].

224. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985), *adopted* Dec. 10, 1984, *entered into force* June 26, 1987, *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985) [hereinafter Torture Convention].

225. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

226. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *adopted* Dec. 16, 1966, *entered into force* Jan. 3, 1976 [hereinafter ICESCR].

227. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989), *adopted* Nov. 20, 1989, *entered into force* Sept. 2, 1990, *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter Child's Convention].

228. See Etienne, *supra* note 199, at 148.

will not be discriminated against because of their sex and shall not have their "human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" impaired.²²⁹ However, "explicit prohibition of violence against women is singularly absent."²³⁰

Despite the broad language of CEDAW, some commentators have argued that CEDAW has not provided the level of protection that many hoped.²³¹ First, CEDAW defines the rights of women in "relation to the positive rights of men."²³² It has been argued that an attempt to guarantee women "equal" rights with men does not afford women protection for certain violations that are particular to their sex.²³³ This is especially true in the case of FGM for which there is no practical male equivalent.²³⁴

Second, CEDAW establishes state obligations, but does not create enforceable international law under which individuals and states can be punished.²³⁵ CEDAW codifies existing norms under international law, but this alone does not establish "positive law enforceable by international tribunals."²³⁶ Gender based violence needs to be enforceable if women are to be put in a position of strength. One commentator has argued that condemning violence against women is only the beginning; gender based violence needs to be classified as *jus cogens* or the internationally accepted standard of law.²³⁷

229. CEDAW, *supra* note 222, at art. 1.

230. RADHIKA COOMARASWAMY, REINVENTING INTERNATIONAL LAW: WOMEN'S RIGHTS AS HUMAN RIGHTS IN THE INTERNATIONAL COMMUNITY 10 (1997).

231. See Etienne, *supra* note 199, at 148-49; COOMARASWAMY, *supra* note 230.

232. Etienne, *supra* note 199, at 148.

233. See *id.* It has been argued that women should not seek complete equality with men, but should instead seek parity. See *id.* The basis of this argument lies in the understanding that men and women do have certain differences, such as reproductive capabilities. In addition, women suffer certain forms of persecution and violence that men do not, such as FGM and certain forms of rape. This is especially true when rape is used as a form of genocide, as it was during the war in Bosnia. See generally Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348 (1998). Due to these innate biological differences, it is argued, women cannot be completely equal with men, and to attempt to do so would in fact be detrimental. See *id.* In addition, if women were to seek complete, or formal, equality, there could be no remedial measures taken, such as affirmative action. Parity, or substantive equality, takes various factors into consideration when determining how women should be treated.

An example to illustrate the concepts is detention. If women are detained in complete, formally equal conditions, there would be no consideration given to women who are pregnant or nursing children. Men would not be allowed to have their small children with them in detention, and therefore, under formal equality, women should not be allowed to do so either. However, if one were arguing for parity, or substantive equality, the nursing mother may be allowed to keep her child with her.

234. See *supra* section II.A.

235. See Levy, *supra* note 205, at 282.

236. *Id.*

237. See O'Hare, *supra* note 216, at 394.

Third, CEDAW is "the human rights convention with the largest number of state reservations."²³⁸ The United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, argued that this fact alone is very telling about the state of women's rights as human rights.²³⁹ According to Coomaraswamy, women's rights, while seemingly quite popular internationally, are very fragile, have weak implementation procedures and suffer from inadequate financial support.²⁴⁰

Despite these limitations, the language used in CEDAW, especially Articles 2 and 5, can be of great use to women seeking redress from FGM.²⁴¹ Article 2 requires state parties "to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women."²⁴² To accomplish this goal, states are required "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."²⁴³ Article 5 requires state parties "[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."²⁴⁴ Twenty-three of the twenty-eight African nations that practice FGM have signed CEDAW.²⁴⁵

CEDAW may, therefore, appear at first glance to be an effective tool in prosecuting cases of FGM. However, some have argued the numerous state reservations may defeat the purpose of the Convention altogether.²⁴⁶

238. COOMARASWAMY, *supra* note 230, at 3.

239. See Etienne, *supra* note 199, at 149, n.57. A United Nations Rapporteur "is a reporter or spokesperson who is charged with visiting countries to document violations of particular conventions or treaties." *Id.*

240. See COOMARASWAMY, *supra* note 230, at 3.

241. It can be argued that FGM violates CEDAW because it is a form of discrimination against women. Various articles of CEDAW require states to take action to eliminate discrimination against women. When such action is not taken, it can be argued that the state has violated CEDAW. This argument could be used by women who are lobbying to outlaw FGM, as a basis to show they are persecuted when arguing for asylum, or in an attempt to seek reparations for the discrimination to which they have been subjected.

242. CEDAW, *supra* note 222, at art. 2.

243. *Id.* at art. 2(f).

244. *Id.* at art 5.

245. See United Nations Web Page on Human Rights, *supra* note 198.

246. See Etienne, *supra* note 199, at 150. See generally Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994). Often, these reservations are based on cultural or religious objections. See, e.g., Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J. L. & RELIGION 105 (1995-1996); Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1 (1995). When a state places a reservation on a convention, it is saying in effect that it will abide by the convention

These reservations, combined with its lack of enforcement power may be a barrier to its complete and effective use in helping victims of FGM.

Very recently, the United Nations added a much sought after provision to CEDAW. CEDAW did not contain an individual petition process, an omission that was the target of considerable criticism.²⁴⁷ Women's rights advocates claimed that the lack of an individual petition process was one of the factors that led to the marginalization of women's rights.²⁴⁸ On March 20, 1999, a twenty-three member board approved an individual petition process for CEDAW, an act that many believe will add enforcement power to the convention.²⁴⁹

2. Declaration on the Elimination of Violence Against Women

The United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women (DEVAW) in December 1993.²⁵⁰ Article 1 of DEVAW defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."²⁵¹ FGM falls under this definition.

In addition, the Declaration calls on states "to condemn and eliminate all forms of violence against women in the general community. These include rape, sexual abuse, sexual harassment and intimidation . . . recogniz[ing] that violence can be perpetrated as well as condoned by the state."²⁵² This phrase is of great importance to women who have been or may be forced to undergo FGM. It is essential that the international community recognize that the state's involvement in violence against women can be seen in their failure and refusal to pass appropriate legislation and in their unwillingness to protect women from harm. The state has a duty to protect women, and not to condone blatant acts of gender motivated violence such as FGM.

up to the "reserved" point. With CEDAW, many nations have claimed that they will abide by the Convention, as long as it does not contravene religion or tradition. FGM is often seen as a tradition, and therefore, these member nations can claim that they are not violating CEDAW because of the reservation.

247. For a discussion of the lack of individual petition and its ramifications, see O'Hare, *supra* note 216, at 380-83.

248. *See id.*

249. *See generally* Paul Lewis, *UN Adds Some Teeth to Treaty for Women*, N.Y. TIMES, Mar. 21, 1999.

250. *See* COOMARASWAMY, *supra* note 230, at 12. In February 1995, the General Assembly appointed a Special Rapporteur on Violence Against Women. As the name of the declaration implies, DEVAW, unlike CEDAW, specifically targets violence against women.

251. DEVAW, *supra* note 223, at art. 1.

252. COOMARASWAMY, *supra* note 230, at 13. As was previously discussed, countries like Sierra Leone are therefore clearly in violation of DEVAW. *See supra* note 222, and accompanying text.

Unfortunately, DEVAW has minimal enforcement value.²⁵³ Declarations do not have to be signed by states as do conventions; they are simply what their name implies, a declaration.²⁵⁴ However, the language used in DEVAW could be of great use to those seeking redress from FGM because it can be interpreted as the international standard to which nations should be held.

The United Nations should consider a convention, which would be enforceable, with similar language to that used in DEVAW. CEDAW does not specifically address violence and DEVAW's reference to violence is essential, not only for women seeking redress from FGM, but for all women. Women will never truly be able to achieve a level of parity with men if there are constant forms of gender motivated violence that continue to reinforce the attitudes and beliefs that keep women subordinated. FGM is just such a form of violence. In addition, DEVAW recognizes that the state has a duty to actively protect women and not condone violence against women.²⁵⁵ When a state does not act to protect women, does not act to pass legislation to protect women from violence or consistently fails to prosecute crimes of gender motivated violence, then the state has, implicitly or explicitly, condoned violence against women.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Commentators have argued that the Torture Convention may be used by victims of rape and domestic violence, thereby enabling women to have redress to international criminal bodies.²⁵⁶ According to the Torture Convention, torture is defined as any physical or mental act that is intentionally inflicted for any discriminatory reason.²⁵⁷ FGM causes severe

253. See Etienne, *supra* note 199, at 152.

254. See *id.* However, declarations do serve a valuable purpose. They establish in writing that an organized international body, such as the United Nations, condemns certain acts. See *id.* These can be used as models for future use by other governments and bodies, or may be used as a blueprint for an eventual convention. See *id.*

255. See *supra* note 250 and accompanying text.

256. See Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913 (1996); Malone, *supra* note 188; Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116 (Rebecca J. Cook ed., 1994). See generally Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

257. Torture Convention, *supra* note 224, art. 1. The article reads in full:

For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidation or coercing him or a third person, or for any reason based on discrimination

physical and mental pain and suffering and is inflicted for discriminatory reasons in violation of the Convention. The pain inflicted by FGM does not stop with the initial procedure, but continues throughout a woman's life.²⁵⁸ Even if a woman had been forced to undergo FGM when she was a young child, she could still be subjected to torture later on in life, such as on her wedding night or during and after childbirth.²⁵⁹

Article 2 of the Convention requires states to take action, whether legislative, administrative or judicial, to prevent the torture.²⁶⁰ Therefore, states where FGM is performed have an obligation to try to prevent the practice. This could be achieved in the form of laws that outlaw FGM, or educational programs designed to expose the dangers of FGM.²⁶¹

Torture is universally condemned in various international documents.²⁶² In addition, torture has been recognized as a violation of customary international law.²⁶³ Therefore, a state may be in violation of international law if it participates in or condones torture, regardless of whether it has signed a convention that specifically outlaws the practice.²⁶⁴ FGM is a form of torture, and states can be held accountable for the torture of women that occurs within their borders, whether or not they have ratified the relevant international documents.²⁶⁵

The Convention also states that "[n]o State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture."²⁶⁶ A recent case filed in the United States exemplifies how this

of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id.

258. See *supra* notes 109-18 and accompanying text.

259. See *supra* notes 119-21, 130-34 and accompanying text.

260. Torture Convention, *supra* note 224, at art. 2.

261. See *supra* note 138 and accompanying text (describing a Ugandan tribe that has greatly reduced incidents of FGM through educational efforts).

262. See Liu, *supra* note 4, at 81 (citing United Nations documents, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as regional documents, such as the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms).

263. See *id.* at 80-81. Customary international law is international law that has developed to the point of being universally accepted as the rule of law, and is formed when states follow a general practice of law. See LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 54-57 (3d ed. 1993). In addition, not *all* states need to agree with the rule of law for it to be customary international law. See Liu, *supra* note 4, at 80, n.63 (citing various international cases which held that the prohibition against torture had become part of international customary law). United States federal courts have also recognized that there is a binding prohibition against torture. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 879 (2d Cir. 1980).

264. See Liu, *supra* note 4, at 80-81.

265. See *id.*

266. Torture Convention, *supra* note 224, art. 3 ¶1.

section could be of great use to women who have been or who may be forced to undergo FGM.²⁶⁷ Virginia Anikwata has been fighting to stay in the United States since her husband died.²⁶⁸ If she is deported to Nigeria, she will become the shared property of her husband's family, and her daughter will be forced to undergo FGM.²⁶⁹ According to the Torture Convention, the United States should protect Ms. Anikwata's daughter, because clearly she would be subjected to torture if she were to accompany her mother to Nigeria.²⁷⁰ It has been suggested that Ms. Anikwata return to Nigeria and leave her daughter, who is a United States citizen, in the United States.²⁷¹ This proposal has been met with extreme opposition.²⁷² Ms. Anikwata has no family in the United States, and there are precedent cases that have allowed parents to stay in the United States with their children.²⁷³ While Ms. Anikwata's case is still pending, there are actions that nations should take if they are state parties to the other United Nations covenants.

4. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are binding agreements that enumerate many rights. Some commentators have claimed that the ICESCR may be more applicable to women than the ICCPR.²⁷⁴ The ICESCR calls upon states to take measures, especially legislative measures, to ensure all rights that are enumerated in the Covenant.²⁷⁵ Article 12 of the ICESCR requires that states "recognize

267. See Barbara Crossette, *Mother Cites New U.S. Law on Torture to Fight Return to Nigeria*, N.Y. TIMES, Dec. 3, 1998, at A8 [hereinafter *Mother*]. The "new U.S. law" referred to in the title is the Torture Convention, which the United States ratified in 1994. *Id.*; see, e.g., Debra Baker, *New Grounds for Asylum?: Immigrant Woman Says Tribal Ritual is Torture*, 84 A.B.A. J. 32 (Dec. 1998).

268. See Crossette, *Mother*, *supra* note 267.

269. See *id.*

270. See *id.*

271. See *id.* Ms. Anikwata could also state that she would be subjected to torture if she were to return to Nigeria, since she would be subjected to severe physical and mental pain and suffering.

272. See *id.*

273. See *id.* (stating that "[o]n Nov. 5 an immigration judge in New York allowed an Indian couple to stay in the United States on the ground that their two daughters, both American citizens, could not be expected to develop well under the hardships of India.").

274. Some commentators have argued that the hierarchical importance given to political and civil rights over economic and cultural rights has adversely affected the progress of recognition of women's rights, especially in less developed countries. See Florence Butegwa, *International Human Rights Law and Practice: Implications for Women*, in FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN'S CLAIM TO HUMAN RIGHTS 27 (Margaret A. Schuler ed., 1995); Lewis, *supra* note 1.

275. ICESCR, *supra* note 226, art. 2 ¶1.

the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."²⁷⁶ FGM prevents women from obtaining the highest level of physical health. Article 12 states that "the full realization of" the right to health "shall include . . . [t]he provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child."²⁷⁷ FGM not only threatens the life of the woman in labor, but the life of the baby.²⁷⁸ FGM increases both the number of stillborn babies, and can affect the development of the child. Therefore, FGM is a practice that violates the ICESCR.²⁷⁹

The ICCPR imposes upon states a duty to protect people from unlawful attacks on honor,²⁸⁰ and prohibits "torture and other cruel, inhuman or degrading treatment or punishment."²⁸¹ FGM is an attack on the woman's honor²⁸² and is clearly a form of torture,²⁸³ and for these reasons, FGM violates the ICCPR. The ICCPR calls on state parties to use "laws or other measures as may be necessary to give effect to the rights recognized in the . . . Covenant."²⁸⁴ Therefore, state parties to the ICCPR are required to ensure that steps are taken to eradicate FGM, because FGM violates the Covenant.

5. Convention on the Rights of the Child

FGM also violates the Child's Convention.²⁸⁵ Article 19 requires states to take "all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation . . . while in the care of parent(s), legal guardian(s) or any

276. *Id.* at art. 12 ¶1.

277. *Id.* at art. 12 ¶2. For a detailed analysis of the right to health, and in particular, the right to sexual and reproductive health under the ICESCR and CEDAW, see, e.g., Aart Hendriks, *The Right to Health Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123 (1995).

278. See *supra* notes 132-33 and accompanying text.

279. The United Nations has appointed a Special Rapporteur on the issue of traditional practices affecting the health of women and girls. See *Office of the High Commissioner for Human Rights*, Women's Rights are Human Rights (visited on March 20, 2001) <www.unhchr.ch/women/focus-tradpract.html>. This document outlines the work of the UN, WHO, UNICEF and UNFPA to eradicate FGM because it is seen as a violation of international law.

280. ICCPR, *supra* note 225, at art. 17.

281. *Id.* at art. 7.

282. This can be seen from the condition in which women are often left after FGM. FGM can cause incontinence and many painful conditions. See *supra* section II.C. FGM can also make sex painful and turn a woman's wedding night, a night that is supposed to be very special, into a night of excruciating pain. See *supra* section II.C.

283. See *supra* section III.B.3.

284. ICCPR, *supra* note 225, at art. 2 ¶3(a).

285. See Liu, *supra* note 4, at 82-83.

other person who has the care of the child.”²⁸⁶ FGM clearly falls into this category of treatment. The Child’s Convention is one of the most widely signed United Nations conventions; only two countries have not signed this Convention, the United States and Somalia.²⁸⁷ Due to the large number of nations that are state parties to the Child’s Convention, it could be used frequently in conjunction with the eradication of FGM.

In addition, it has been argued that FGM violates Articles 24 and 37 of the Child’s Convention.²⁸⁸ Article 24 requires states to recognize that children have the right to enjoy “the highest attainable standard of health”²⁸⁹ and, similar to Article 12 of the ICESCR, calls upon states to take action to reduce infant and child mortality.²⁹⁰ Article 37 is similar to Article 7 of the ICCPR in that it also prohibits “torture or other cruel, inhuman or degrading treatment or punishment.”²⁹¹ FGM lowers the standard of health and is a form of torture. Therefore, FGM violates Articles 24 and 37 of the Child’s Convention.

C. REMEDIES AND PROPOSALS FOR CHANGE

Women who have been subjected to FGM should have meaningful redress for the actions committed against them. In addition, women who may be forced to undergo FGM should have access to legal systems that can prevent the procedure from taking place. International law and documents can be used in either situation. In addition, lobby groups and women’s organizations that are attempting to outlaw FGM or receive support for educational programs dealing with the dangers of FGM can use international documents. International customary law can be held up as the standard to which all nations should strive to achieve.

1. Local Courts

Often local courts are considered steeped in the same traditions and culture of the local or national community.²⁹² Therefore, it may be difficult for women to receive an adequate remedy or injunctive relief from a local court. However, local courts can assist women in a variety of ways.

First, local courts must enforce laws that have been passed by the legislatures. France is unusual in its prosecution of cases of FGM.²⁹³ Not only must prosecutors seek indictments and convictions for cases of FGM

286. Child’s Convention, *supra* note 227, at art. 19 ¶1.

287. *See supra* note 196.

288. *See Liu, supra* note 4, at 82-83.

289. Child’s Convention, *supra* note 227, at art. 24 ¶1.

290. *Id.* at art. 1 ¶2(a); *see also supra* note 277 and accompanying text.

291. Child’s Convention, *supra* note 227, at art. 37(a); *see also supra* note 281 and accompanying text.

292. *See Levy, supra* note 205, at 287.

293. *See supra* note 171 and accompanying text.

that violate the national laws, but also courts must be receptive to these actions. Second, local courts can look to the international documents their countries have ratified when deciding cases. Therefore, even if a country has not specifically passed a law outlawing FGM, because FGM violates several international documents, the court could use these as the source of law on which to base its decision.²⁹⁴

Third, local courts must be receptive to cases brought against FGM that may be based on other applicable local laws. For example, a country may not outlaw FGM, but it may outlaw violent child abuse.²⁹⁵ These local laws need to be construed broadly, so as to protect the greatest number of girls from being forced to undergo FGM. In addition, local laws may be more suited to injunctive relief or to civil remedies than to criminal penalties in prohibiting FGM. Again, the laws need to be interpreted broadly to enable women to seek protection from FGM.

Finally, local immigration courts also need to interpret existing laws broadly. This includes viewing FGM as a form of torture, which does not stop with the initial procedure, as well as looking to applicable international conventions and applicable laws when deciding cases. Virginia Anikwata's case is an example of an opportunity for local courts to decide cases in ways favorable to women's rights.²⁹⁶ The court should allow Ms. Anikwata to stay in the United States with her daughter and not deport her to Nigeria.

2. International courts

Due to the fact that it may be difficult to obtain neutrality in a local court, and local courts may not be willing to stretch existing laws or look at international documents when deciding local cases, international courts may be of greater use to women. In order to be most effective, international courts must be free of local bias and undue government influence. They must be neutral and impartial. Because so many international documents, as well as international customary law, can be of use to women who are seeking redress from or prevention of FGM, international courts can be particularly useful. In addition, international courts could hope to avoid the criticism that they are Western biased. If the court were truly international in composition, no one region or way of thinking would dominate. It is essential that the court truly be international in composition in order to be accepted as a legitimate court, and not a court trying to advance the agenda of one geographic region or country.

294. See *supra* section III.

295. For a discussion of how FGM violates United States child abuse laws, see generally Lori Ann Larson, *Female Genital Mutilation in the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237 (1996).

296. See *supra* notes 267-72 and accompanying text.

International courts would have jurisdiction to hear these cases because the state's lack of involvement or inaction can be seen as implicit tolerance of FGM. If FGM is prevalent in a certain country and its leaders have failed to pass legislation against FGM, then the heads of that state can be held accountable for the torture and discrimination that takes place as a result of their inaction. In states that have refused to pass laws and openly condone FGM, the state action is even clearer. International courts would, therefore, have jurisdiction. If the international court were truly impartial and neutral, these courts could be of great use to women in their fight against FGM.

3. Governments

Governments have a duty to protect their citizens. As such, they should pass laws that outlaw harmful practices. At a minimum, governments should be supportive of local groups who attempt to educate the community about the reality of FGM. Education is essential in the fight against FGM. If educational campaigns are conducted properly by local groups who understand the local culture and the position FGM has within that culture, it may be possible to see more groups deciding not to perform FGM, such as the Sabiny people in Uganda.²⁹⁷

4. International bodies

International bodies, such as the United Nations, have successfully put on paper many of the standards and laws that women's groups could use in their fight against FGM. The individual petition process is a welcome addition to CEDAW,²⁹⁸ which can benefit many women. However, the United Nations should implement a convention that specifically targets violence against women. There is language in DEVAW that is extremely useful,²⁹⁹ and the United Nations should consider adopting a convention that contains similar language. In addition, the United Nations needs to ensure that the documents and conventions that protect women are respected in the international community. Attention needs to be placed on the inferior position women continue to hold around the world. Unless the inferior position of women is addressed, practices like FGM will continue.

IV. CONCLUSION

FGM must be seen not as a cultural rite of passage into adulthood, but as a form of torture and sexual subordination of women. Western countries must enforce existing anti-FGM legislation, and ensure that protection is provided to women and girls of all nationalities. International courts must

297. See *supra* note 138 and accompanying text.

298. See *supra* notes 247-49 and accompanying text.

299. See *supra* note 251 and accompanying text.

also enforce existing international law norms and provide women with meaningful legal assistance in their quest to eradicate this form of abuse.

It is important, however, for Western women's rights groups not to impose their own sets of values on African women. African women and men are starting to realize the brutality of FGM. The United Nations Special Ambassador on female genital mutilation, Waris Dirie, believes that FGM is coming to an end.³⁰⁰ Ms. Dirie, a supermodel in England who underwent FGM at the age of five and later fled Somalia to avoid an arranged marriage,³⁰¹ believes that women in Africa will stand up, exert their rights and the procedure will end.³⁰² By taking affirmative steps, local courts, international courts, governments and women's rights groups can assist in bringing Ms. Dirie's beliefs to fruition.

300. See Amy Finnerty, *Questions for Waris Dirie: The Body Politic: The United Nations special ambassador on female genital mutilation talks about her childhood in Somalia, her life as a fashion model and her very personal crusade*, N.Y. TIMES MAG., May 9, 1999, at 22.

301. See *id.*

302. See *id.*